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tatus: GRANTED

Title: A. L. Lockhart, Director, Arkansas Department of
Correction, Petitioner
V.
Ardia V. McCree

ocketed:
ay 29, 1985

Court: United States Court of Appeals
for the Eighth Circuit

ee also:
84-6187

Counsel for petitioner: Clark, John Steven

Counsel for respondent: Boger, John Charles, Gross, Samuel R.

Entry	Date	Note	Proceedings and Orders
1	Apr 8 1985	Application for extension of time to file petition and order granting same until May 30, 1985 (Blackmun, April 10, 1985).	
2	May 29 1985	G Petition for writ of certiorari filed.	
3	Jun 26 1985	Supplemental brief of petitioner Lockhart, Director, AK DOC filed.	
4	Jun 28 1985	Brief amicus curiae of Alabama, et al. filed.	
5	Jul 12 1985	Order extending time to file response to petition until July 25, 1985.	
7	Jul 25 1985	Brief of respondent Ardia McCree in opposition filed.	
8	Jul 25 1985	G Motion of respondent for leave to proceed in forma pauperis filed.	
9	Jul 31 1985	DISTRIBUTED. September 30, 1985	
10	Aug 7 1985	REDISTRIBUTED. September 30, 1985	
11	Sep 20 1985	X Reply brief of petitioner Lockhart, Dir. AR DOC filed.	
12	Oct 7 1985	Motion of respondent for leave to proceed in forma pauperis GRANTED.	
13	Oct 7 1985	Petition GRANTED. *****	
14	Nov 21 1985	SET FOR ARGUMENT, Monday, January 13, 1986. (1st case).	
15	Nov 22 1985	Brief amicus curiae of Alabama, et al. filed.	
16	Nov 21 1985	Joint appendix filed.	
17	Nov 23 1985	Brief amicus curiae of Arizona, et al. filed.	
18	Nov 25 1985	Brief of petitioner Lockhart, Dir. AR DOC filed.	
19	Dec 9 1985	CIRCULATED.	
20	Dec 23 1985	X Brief amicus curiae of American Psychological Assn. filed.	
21	Dec 21 1985	X Brief of respondent Ardia McCree filed.	
22	Dec 23 1985	X Brief amicus curiae of Billy Junior Woodward filed.	
23	Dec 24 1985	X Brief amicus curiae of Robert Popper, et al. filed.	
24	Dec 23 1985	X Brief amicus curiae of National Center for Institutions and Alternatives filed.	
25	Jan 6 1986	X Reply brief of petitioner Lockhart, Dir. AR DOC filed.	
26	Dec 31 1985	Nine copies of lodging received.	
27	Jan 13 1986	ARGUED.	

**PETITION
FOR WRIT OF
CERTIORARI**

84-1865

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In the
Supreme Court of the United States

No. _____

October Term, 1984

A. L. Lockhart, Director, Arkansas
Department of Correction *Petitioner*

V.

Ardia V. McCree *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE JURY TRIAL GUARANTEE OF THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT ALLOW THE EXCLUSION FOR CAUSE FROM THE GUILT PHASE OF A CAPITAL MURDER TRIAL OF ALL JURORS WHO CAN PROPERLY BE EXCLUDED FOR CAUSE FROM THE PENALTY PHASE BECAUSE OF THEIR REFUSAL TO FOLLOW THE LAW AND THE INSTRUCTIONS OF THE COURT?
2. WHETHER, FOR PURPOSES OF A REPRESENTATIVE CROSS-SECTION ANALYSIS PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS, THIS COURT'S PRECEDENTS PROHIBIT APPLYING THE CROSS-SECTION REQUIREMENT TO PETIT JURIES AND FINDING A GROUP "COGNIZABLE" SOLELY BECAUSE OF THE ATTITUDES OF ITS MEMBERS?
3. WHETHER THE STATE'S INTERESTS IN REMOVING BIASED JURORS FROM THE PENALTY PHASE OF A CAPITAL MURDER TRIAL AND IN SEATING ONLY ONE JURY TO TRY BOTH PHASES OF SUCH A TRIAL, OUTWEIGH A CAPITAL DEFENDANT'S INTEREST IN SEATING SUCH JURORS IN THE GUILT PHASE?
4. WHETHER THE EIGHTH CIRCUIT ERRED IN RELYING ON CIRCUMSTANTIAL SOCIAL SCIENCE RESEARCH EVIDENCE INVOLVING UNREALISTIC SIMULATIONS TO CONCLUDE THAT JURORS PROPERLY EXCLUDABLE FOR CAUSE FROM THE PENALTY PHASE OF A CAPITAL MURDER TRIAL MUST BE SEATED IN THE GUILT PHASE OF SUCH TRIALS?

PARTIES

The parties to this proceeding will be A.L. Lockhart, petitioner, and Ardia V. McCree, respondent. A.L. Lockhart is the director of the Arkansas Department of Correction and is the successor to the former parties James Mabry and Vernon Housewright. Although this case originally involved the consolidated habeas petitions of James T. Grigsby and Ardia V. McCree, Grigsby died before the District Court entered a judgment in the case. As such, both the judgment entered by the District Court and the Eighth Circuit apply only to McCree.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv-viii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3-6
REASONS FOR GRANTING THE WRIT	7-23
I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS' HOLDING THAT A "DEATH- QUALIFIED" JURY IS UNCONSTITUTIONAL IS IN CONFLICT WITH OTHER COURTS OF APPEALS AND WITH THE ARKANSAS SUPREME COURT	7-11
II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S HOLDING THAT THE EXCLUSION-FOR-CAUSE OF <i>WITHERSPOON</i> -EXCLUDABLES FROM CAPITAL MURDER JURIES IS A VIOLATION OF THE REPRESENTATIVE CROSS-SECTION REQUIREMENT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT	11-14
III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE ARKANSAS IS JUSTIFIED BOTH (1) IN EXCLUDING JURORS IN THE GUILT PHASE OF A CAPITAL MURDER TRIAL WHO WILL NOT FOLLOW THE LAW IN THE	

PENALTY PHASE AND (2) IN TRYING BOTH PHASES OF A CAPITAL CASE BEFORE THE SAME JURY	15-20
IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE IN HOLDING THAT A "DEATH- QUALIFIED" JURY IS UNCONSTITUTIONALLY BIASED, THE EIGHTH CIRCUIT RELIED ON INHERENTLY UNRELIABLE EVIDENCE AND MISAPPLIED APPLICABLE DECISIONS OF THIS COURT	20-23
CONCLUSION	24
APPENDIX	A-1 - A-54

TABLE OF AUTHORITIES

CASES:	Page
<i>Adams v. Texas</i> , 448 U.S. 38 (1980)	16, 17
<i>Ballew v. Florida</i> , 435 U.S. 223 (1978)	20
<i>Ballew v. United States</i> , 329 U.S. 187 (1946)	13
<i>Coble v. State</i> , 274 Ark. 134, 624 S.W.2d 421 (1981)	19
<i>Collins v. Lockhart</i> , 754 F.2d 258 (8th Cir. 1985)	8, 9
<i>Dennis v. United States</i> , 339 U.S. 162 (1949)	20
<i>Duren v. Missouri</i> , 439 U.S. 357 (1979)	9, 11, 13
<i>Fairchild v. State</i> , 284 Ark. 289, 681 S.W.2d 380 (1984)	10
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	20

<i>Grigsby v. Mabry</i> , 483 F. Supp. 1374 (E.D. Ark.) <i>aff'd. in part, vacated in part, remanded</i> 637 F.2d 525 (8th Cir. 1980)	3, 15
<i>Grigsby v. Mabry</i> , 569 F. Supp. 1273 (E.D. Ark. 1983) <i>aff'd.</i> , 758 F.2d 226 (8th Cir. 1985)	1, 4, 18
<i>Hager v. State</i> , 665 P.2d 319 (Okla. Crim. App. 1983)	19
<i>Hayes v. Missouri</i> , 120 U.S. 68 (1887)	17-18
<i>Hendrickson v. State</i> , No. Cr 84-164 (Ark. April 29, 1985)	10
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	20
<i>Keeten v. Garrison</i> , 742 F.2d 129 (4th Cir. 1984)	7, 8
<i>Linell v. State</i> , 283 Ark. 162, 671 S.W.2d 843 (1984)	10
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	11, 12, 14, 16
<i>McCleskey v. Kemp</i> , 753 F.2d 877 (11th Cir. 1985)	7, 21
<i>McCree v. Housewright</i> , PB-C-80-429 (Jan. 6, 1982), <i>aff'd.</i> , 689 F.2d 797 (8th Cir. 1982), <i>cert. denied sub. nom., McCree v. Lockhart</i> , 103 S.Ct. 1782 (April 18, 1985)	4
<i>Mabry v. Grigsby</i> , 758 F.2d 226 (8th Cir. 1985)	1
<i>Mabry v. Grigsby</i> , No. 83-2113 (8th Cir. Jan. 30, 1985)	<i>Passim.</i>
<i>Maxwell v. Bishop</i> , 398 U.S. 262 (1970)	17

<i>Needham v. State</i> , 215 Ark. 935, 224 S.W.2d 785 (1949)	3
<i>Nettles v. State</i> , 409 So.2d 85 (Fla. App. 1982)	19
<i>Owens v. State</i> , 283 Ark. 327, 675 S.W.2d 843 (1984)	10
<i>People v. Gaines</i> , 88 Ill.2d 342, 430 N.E.2d 1046 (1981)	19
<i>People v. Newsome</i> , 110 Ill. App.3d 1043, 443 N.E.2d 643 (1982)	19
<i>Pitts v. Lockhart</i> , 753 F.2d 689 (8th Cir. 1985)	8, 9
<i>Pruett v. State</i> , 282 Ark. 304, 669 S.W.2d 186 (1984)	10
<i>Rector v. State</i> , 280 Ark. 385, 659 S.W.2d 168 (1983)	3, 9, 16, 18, 19
<i>Roberts v. Louisiana</i> , 428 U.S. 325 (1976)	20
<i>Ruiz & Denton v. Lockhart</i> , 754 F.2d 254 (8th Cir. 1985)	8
<i>Sinclair v. Turner</i> , 447 F.2d 1158 (10th Cir. 1971)	8
<i>Smith v. Balkcom</i> , 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858, cert. denied, 459 U.S. 882 (1982)	7, 18, 19, 20
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982)	20

<i>Spinkellink v. Wainwright</i> , 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)	7, 17
<i>State v. Bass</i> , 189 N.J. Super. 461, 460 A.2d 223 (1983)	19
<i>State v. Hutchinson</i> , ____ N.M. ____, 661 P.2d 1315 (1983)	19
<i>State v. Jackson</i> , ____ N.C. ____, 305 S.E.3d 703 (1983)	19
<i>State v. Ladd</i> , ____ N.C. ____, 302 S.E.2d 164 (1983)	19
<i>Swain v. Alabama</i> , 380 U.S. 202 (1965)	14, 17
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975)	12, 13, 18, 19
<i>Tuberville v. United States</i> , 303 F.2d 411 (D.C. Cir. 1962)	8
<i>United States, ex rel. Clark v. Fike</i> , 538 F.2d 750 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977)	7-8
<i>United States v. Potter</i> , 552 F.2d 901 (9th Cir. 1977)	13, 14
<i>United States v. Puff</i> , 211 F.2d 171 (2d Cir.), cert. denied, 347 U.S. 963 (1954)	8
<i>United States, ex rel. Townsend v. Twomey</i> , 452 F.2d 350 (7th Cir.), cert. denied, 409 U.S. 854 (1972)	8
<i>United States v. Wood</i> , 299 U.S. 133 (1936)	20

Wainwright v. Witt, 105 S.Ct. 844
(Jan. 21, 1985) 3, 12, 13, 14, 16, 17

Witherspoon v. Illinois, 391
U.S. 510 (1968) 3, 11, 12, 15, 18

Woodard v. Sargent, 753 F.2d 694 (1985) 8, 9

STATUTES:

28 U.S.C. §1254(1) 2

28 U.S.C. §2254 (1977) 3

Ark. Stat. Ann. §41-1301(3) (Repl. 1977) 18

CONSTITUTIONAL PROVISIONS:

Sixth Amendment 2

Fourteenth Amendment 2

In the Supreme Court of the United States

No. _____

October Term, 1984

A. L. Lockhart, Director, Arkansas
Department of Correction *Petitioner*

V.

Ardia V. McCree *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. L. Lockhart, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Mabry v. Grigsby*, 758 F.2d 226 (8th Cir. 1985). The opinion of the Court is reprinted in slip opinion form in the Appendix to this petition. The opinion of the District Court is reported as *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983).

JURISDICTION

The judgment of the Court of Appeals *en banc* was entered on January 30, 1985. A petition for rehearing was not filed. On April 10, 1985, Justice Harry A. Blackmun entered an order extending the time for filing a petition for a writ of certiorari in this case to and including May 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury"

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

In 1978, the United States District Court for the Eastern District of Arkansas properly assumed jurisdiction of this habeas corpus action pursuant to 28 U.S.C. § 2254 (1977).

The issues in this case concern the question left open in *Witherspoon v. Illinois*, 391 U.S. 510, 520 n. 18 (1968): whether a "death-qualified" jury, i.e. a jury with those persons stricken for cause who state at *voir dire* that they would refuse to consider capital punishment, is "less than neutral with respect to *guilt*." (Emphasis original.)

Prosecuting attorneys in Arkansas often death-qualify juries in capital murder cases. In doing so, they follow *voir dire* procedures which are in compliance with this Court's decisions in *Witherspoon* and *Wainwright v. Witt*, 105 S.Ct. 844 (Jan. 21, 1985). However, such procedures were firmly in place in Arkansas prior to *Witherspoon*. *Needham v. State*, 215 Ark. 935, 224 S.W.2d 785 (1949). See *Rector v. State*, 280 Ark. 385, 390-92, 659 S.W.2d 168 (1983) (explaining the history of jury selection in capital cases in Arkansas).

This case was originated by James T. Grigsby, who was convicted of capital murder by a "death-qualified" jury and sentenced to life without parole in 1978 in state court. After an evidentiary hearing in 1979, the District Court rejected the allegation that "death-qualified" juries violate the representative cross-section requirement of the Sixth Amendment to the United States Constitution but ordered the State to afford Mr. Grigsby an evidentiary hearing on the issue of the conviction-proneness of such juries. On appeal, the Eighth Circuit remanded, ordering that the evidentiary hearing be held in the District Court. *Grigsby v. Mabry*, 483 F. Supp. 1372 (E.D. Ark.), *aff'd in part, vacated in part, remanded*, 637 F.2d 525 (8th Cir. 1980). At the second hearing in July, 1981, the habeas action of Ardia Mc-

Cree was consolidated with Grigsby's on these same issues. Mr. McCree was convicted of capital murder in 1978 by a "death-qualified" jury and sentenced to life without parole. (All other issues in his habeas petition have been resolved against him. *McCree v. Housewright*, PB-C-80-429, (Jan. 6, 1982), *aff'd*, 689 F.2d 797 (8th Cir. 1982), *cert. denied sub. nom.*, *McCree v. Lockhart*, 103 S.Ct. 1782 (April 18, 1985).) (The parties are referred to herein as the State and McCree.)

After holding an evidentiary hearing on the issues as required by the Eighth Circuit, the District Court found that both the Sixth Amendment right to have a jury selected from a representative cross-section of the community, and the Fourteenth Amendment due process right to have an impartial jury were violated when a defendant in a capital case was tried before a "death-qualified" jury. *Grigsby v. Mabry*, 569 F.Supp. 1273, 1321-23 (E.D. Ark. 1983).

The Eighth Circuit Court of Appeals affirmed the District Court, finding "substantial evidence" to support the lower court's finding that a death-qualified jury "is in fact conviction prone and, therefore, does not constitute a cross-sectional representation in a given community." *Mabry v. Grigsby*, No. 83-2113 (8th Cir. Jan. 30, 1985) slip op. at 3.

In finding that the death qualification of a capital jury results in a cross-section violation, the Eighth Circuit applied such analysis to petit juries. The court concluded "that the state cannot defeat a sixth amendment claim on the ground that we deal only with a petit jury, rather than the jury pool at large." *Id.* at 8. And, with no detailed discussion or analysis, the court also found *Witherspoon* - excludables (hereafter WEs) to be a distinctive group in the community and, thus, subject to the Sixth Amendment's fair cross-section analysis. *Id.* at 8-9.

The court then turned to what it termed the "fundamental issue facing" it: "whether the evidence supports the district court's finding that a jury with WEs stricken for cause is a conviction-prone jury." *Id.* at 10. The court accepted as proof the evidence regarding conviction-proneness which had been presented to the District Court and which consisted of social science research in the form of studies and surveys.

McCree's research measures the attitudes of laboratory subjects and survey respondents and attempts to correlate one attitude—that toward the death penalty—with another "cluster" of attitudes purporting to measure conviction-proneness. The basic conclusion was that those who "favor" the death penalty are more prone to convict and that those who oppose it are more prone to acquit.

In summary, the Eighth Circuit held that removing WEs for cause (death qualifying the jury) violates the representative cross-section requirement and that it results in a "conviction-prone" jury, one composed only of "death-qualified" jurors (hereafter DQs). The court discounted the impact of the exclusion of a third relevant group, those who would automatically impose the death penalty (hereafter ADPs). The court further held that WEs (but not ADPs) must be included in the guilt phase of capital murder trial.

To comply with the Eighth Circuit's opinion in *Grigsby*, Arkansas will have to make sweeping changes in its jury selection procedure. Thus, capital murder juries would be selected in Arkansas and in the Eighth Circuit in a vastly different manner from the procedures used by other states around the country.

The dissent, representing four judges of the nine member court, disagreed with the majority at every turn. The dissent first noted that the Sixth Amendment does not

require the inclusion of those jurors who refuse to follow Arkansas law and to consider the full range of penalties it provides. *Id.* at 34 (Gibson, J., dissenting). These four judges did not agree that the cross-section requirement applies to petit juries, *id.* at 35 (Gibson, J., dissenting), or that WEs are a distinctive group, *id.* at 37 (Gibson, J., dissenting). Finally, the dissent rejects the majority's finding that McCree proved that juries with WEs removed are more conviction-prone. *Id.* at 44-46 (Gibson, J., dissenting).

The State has been ordered to retry or release McCree. *Id.* at 34. A stay of this order was entered by the Eighth Circuit pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS' HOLDING THAT A "DEATH-QUALIFIED" JURY IS UNCONSTITUTIONAL IS IN CONFLICT WITH OTHER COURTS OF APPEALS AND WITH THE ARKANSAS SUPREME COURT.

The Eighth Circuit acknowledged in *Grigsby* that it had created a split among the circuit courts of appeals, stating:

We are very aware that our affirmance of the district court here creates a conflict among circuits; this is an important issue since the decision relates to hundreds of prisoners now on death row. We are hopeful the Supreme Court will grant a writ of certiorari and resolve the issue.

Grigsby, slip op. at 24 (footnote omitted). The Eighth Circuit stands alone in its holding on these issues. *Id.*, slip op. at 48 (Gibson, J., dissenting). Further, *Grigsby* represents a five-four split of the Eighth Circuit sitting *en banc*.

Of the circuit courts of appeals that have reached these issues, three circuits have held *contra* to *Grigsby*. *McClesky v. Kemp*, 753 F.2d 877, 901 (11th Cir. 1985); *Keeten v. Garrison*, 742 F.2d 129, 134 (4th Cir. 1984); *Smith v. Balkcom*, 660 F.2d 573, 578-79 (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 593-95 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). In each of these cases, the courts reviewed evidence on the guilt-proneness issue. There is also an older line of cases which is also in conflict with *Grigsby* but these cases do not include significant evidentiary records on the guilt-proneness issue. *United States ex rel. Clark v. Fike*, 538

F.2d 750, 761-62 (7th Cir. 1976); *cert. denied*, 429 U.S. 1064 (1977); *United States ex rel. Townsend v. Twomey*, 452 F.2d 350, 362-63 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972); *Sinclair v. Turner*, 447 F.2d 1158, 1166-67 (10th Cir. 1971); *Tuberville v. United States*, 303 F.2d 411, 418-21 (D.C. Cir. 1962); *United States v. Puff*, 211 F.2d 171, 182-86 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954).

The District Court in *Keeten* held in accord with the District Court in *Grigsby*. In reversing *Keeten*, the Fourth Circuit had the *Grigsby* record available and rejected its issues as a matter of law. The State notes that a petition for certiorari in *Keeten* is currently pending before this Court. The respondent in that case has opposed the granting of certiorari on Keeten's behalf and stated its belief that summary reversal would be appropriate in the instant case.

The Eighth Circuit has further broadened the impact of *Grigsby* by applying it retroactively and by making unclear the application of a procedural bar to this issue. The day after *Grigsby* came down, the Eighth Circuit applied it to four convictions in three other capital cases and held that it would be applied retroactively. *Ruiz & Denton v. Lockhart*, 754 F.2d 254 (8th Cir. 1985); *Woodard v. Sargent*, 753 F.2d 694 (1985); *Pitts v. Lockhart*, 753 F.2d 689 (8th Cir. 1985).

In those cases and one other, decided by the same panel on the same day, the Eighth Circuit addressed procedural bar issues in two (or three) different ways. In *Pitts*, 753 F.2d at 691, the panel held that a *per se* rule was adopted in *Grigsby* and implied that all those convicted by "death-qualified" juries will have their convictions vacated. In *Collins v. Lockhart*, 754 F.2d at 261 (8th Cir. 1985), the panel found the evidence of Collins' guilt overwhelming and concluded that he could not show the requisite prejudice to obviate a valid procedural bar. In *Ruiz*, 754 F.2d at 256-57, and *Woodard*, 753 F.2d at 698-701, the court implicitly recognized that the petitioners had a serious problem with procedural bar, since it went to great lengths to find that no

procedural bar existed. To add even further confusion, an internal inconsistency in *Woodard* puts it in accord and in conflict with both *Pitts* and *Collins*, which appear to be in conflict with each other. The court first held in *Woodard* that "the *Grigsby* issue is the sort of question that is subject to the cause-and-prejudice mode of analysis." *Id.* at 698 n. 2. It later held that "[u]nder *Grigsby* the presence or absence of prejudice in the particular case is beside the point." *Id.* at 701-02. It is perhaps unnecessary to note that the State will shortly be asking this Court to review these cases and reconcile the procedural bar issue.

Grigsby mandates sweeping changes in law and procedure in Arkansas and other states in the Eighth Circuit. It directly affects the capital jury selection procedures of South Dakota and Missouri, and it may also affect those of Nebraska, although that state has judge sentencing. It creates disparate constitutional standards for capital murder trials occurring within the circuit and extends the impact of these disparate standards into the other circuits by reaching its conclusions through incorrect interpretations of numerous sub-issues.

Grigsby also places the Eighth Circuit in direct conflict with the Arkansas Supreme Court. After the District Court's opinion was issued, the Arkansas court specifically rejected its holding. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983). The Arkansas court found it only necessary to consider the District Court's finding on conviction-proneness:

because if the State has a significant interest that justifies the exclusions inherent in the death-qualification process, it is immaterial that the excluded venireman might be considered to be a distinctive group in the community. *Duren v. Missouri*, 439 U.S. 357 (1979).

Rector, 280 Ark. at 393. The court went on to find that (1) conviction-proneness is not destructive of a juror's impar-

tiality and that (2) the same jurors should have the responsibility for determining guilt and fixing punishment.

The dissent in *Grigsby* apparently agrees with the Arkansas court's findings when it states:

The [majority's] first error in this analysis lies in, assuming that partiality as a *legal* concept is proven when *factually* it can be shown that juries with WEs removed are more conviction-prone. (Emphasis original.)

Id., slip op. at 44. The dissent also recognizes the State's interest in a one-jury system and in excluding WEs from the guilt phase. *Id.*, slip op. at 43.

The Arkansas court has reaffirmed its decision in *Rec-tor* several times. See, e.g., *Fairchild v. State*, 248 Ark. 289, 681 S.W.2d 380 (1984); *Owens v. State*, 283 Ark. 327, 675 S.W.2d 843 (1984); *Linell v. State*, 283 Ark. 162, 671 S.W.2d 741 (1984); *Pruett v. State*, 282 Ark. 304, 669 S.W.2d 186 (1984).

After the Eighth Circuit affirmance, the Arkansas court again rejected these arguments but joined the Eighth Circuit in its hope that this Court will resolve the conflict. *Hendrickson v. State*, No. CR 84-164 (Ark. April 29, 1985), slip op. at 4.

The procedure for capital jury selection in Arkansas follows this Court's holding in *Witt* and *Witherspoon*. It is implicit in both cases that the States are permitted to exclude from capital murder juries those jurors who refuse to follow the law and the instructions of the court. *Witt* was handed down nine (9) days before *Grigsby*. The *Grigsby* majority's only reference to *Witt* was to add a footnote negating its impact on the *Grigsby* holdings. *Grigsby*, Order of March 18, 1985, amending slip op. at 34.

The legal reasoning which enabled the Eighth Circuit to reach its ultimate conclusions is in derogation of

numerous precedents of this Court. The Eighth Circuit's misapplication of those opinions will be discussed more fully in the points below.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S HOLDING THAT THE EXCLUSION-FOR-CAUSE OF *WITHERSPOON*-EXCLUDABLES FROM CAPITAL MURDER JURIES IS A VIOLATION OF THE REPRESENTATIVE CROSS-SECTION REQUIREMENT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

By circuitous reasoning, the Eighth Circuit held in *Grigsby* that a "death-qualified" jury does not comprise a valid cross-section of the community because it is conviction prone. The court found WEs to be a cognizable group under *Duren v. Missouri*, 439 U.S. 357 (1979), and held that their systematic exclusion from a petit jury violates the Sixth Amendment's cross-section requirement. These findings are all in conflict with the applicable precedents of this Court.

This Court has never addressed on its merits the allegation that excluding WEs from the *guilt* phase of a capital murder trial violates the Sixth Amendment. In *Witherspoon*, this Court declined to reach that issue because of the insufficiency of the evidence regarding guilt-proneness. *Id.* at 517-18.

The Court came closest to reaching the issue in *Lockett v. Ohio*, 438 U.S. 586 (1978). The *Lockett* jury sat only in the guilt phase, and *Lockett* dealt only with "nullifiers," those jurors who admitted that they could not be fair and impartial in the guilt phase, *id.* at 595-96. (Even *Grigsby* has conceded that nullifiers can be excluded from the guilt phase.) The Court rejected the cross-section issue as applied in that context:

Nor was there any violation of the principles of *Taylor v. Louisiana*, [419 U.S. 522 (1975)]. In *Taylor*, the Court invalidated a jury selection system that operated to exclude a "grossly disproportionate" . . . number of women from jury service thereby depriving the petitioner of a jury chosen from a "fair cross-section" of the community. . . . Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge.

Id., 438 U.S. at 596-97.

In *Witt*, the Court rejected the concept that *Witherspoon* itself provides some legal basis for the cross-section argument. *Witt*, 105 S.Ct. at 852 n. 5. While *Witt* appears to adopt the balancing approach urged here in Point IV, its holding was carefully limited to exclusion of WEs from the penalty phase. *Witt*'s explication of *Witherspoon* makes it clear that the Eighth Circuit was in error when it found *Witherspoon* to directly support its findings on the cross-section issue. *Grigsby*, slip op. at 7. This was forcefully pointed out by the *Grigsby* dissent, which further noted that the cross-section requirement had not even been applied to the States at the time *Witherspoon* was decided. *Id.*, slip op. at 37 (Gibson, J., dissenting).

The Eighth Circuit's first wayward step in its faulty cross-section analysis was in improperly applying the fair cross-section requirement to a petit jury. The court stated that there was "no justifiable reason to conclude that a statute which systematically eliminates distinct groups of citizens from sitting on a petit jury would not violate the sixth amendment requirement of a representative cross-sectional jury." *Grigsby*, slip op. at 6. This conclusion is mistaken for a number of reasons. First, the State has no statute which "systematically eliminates" anyone from capital juries. The exclusions at issue here are those clearly permitted by *Witt*, *Lockett* and *Witherspoon*. Further, the

Eighth Circuit would have found ample "justifiable reason" to avoid applying the cross-section requirement to petit juries had it followed *Duren* and *Taylor*.

In *Duren*, it was noted that the representativeness requirement applies to "jury wheels, pools of names, panels, or venires from which juries are drawn." *Id.*, 439 U.S. at 363-4. Similarly, in *Taylor*, 419 U.S. at 527, the Court stated, "[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect various distinctive groups in the population." The holding in *Taylor* applied only to "jury wheels, pools of names, panels or venires." *Id.* at 538.

The Eighth Circuit's Sixth Amendment analysis improperly extends *Duren* and *Taylor* to apply the cross-section requirement to petit juries. It fails to follow *Swain* because it requires that members of a specific group be seated on petit juries. It further ignores the balancing of interests required when biased juries are identified, as noted in *Witt*, 105 S. Ct. at 852 n. 5.

The Eighth Circuit next erred in finding that cognizability can be defined solely in terms of attitude. Cross-section analysis has always begun with a group that had some internal cohesion or common characteristic *other than* attitudes. When the group is readily identifiable by some objective classification, the courts *then* examine the attitudes of the group to determine if an "identifiable" group is necessarily "cognizable." See *Ballew v. United States*, 329 U.S. 187, 193-194 (1946).

Although this Court has never clearly defined cognizability, the Ninth Circuit has held that cognizability requires "an identifiable group, which in some objectively discernable and significant way, is distinct from the rest of society, and whose interests cannot be adequately represented by other members of the . . . panel." *United States v. Potter*, 552 F.2d 901, 903 (9th Cir. 1977). The Ninth

Circuit also required "the presence of some internal cohesion." Other factors are "whether a particular class is in fact thought of as an identifiable group by the community," and whether there exists "prejudice or community discrimination against the group." *Id.* at 904-05.

It appears that a discussion of attitudes has been used primarily by the federal courts to *reject* arguments that an otherwise identifiable group is cognizable. A group is simply not cognizable if it is "diverse . . . [and] lacking in distinctive characteristics or attitudes which set them apart from the rest of society." If they are "of varying economic backgrounds, and races, and of many different ages," their interests "can be adequately protected by the remainder of the populace." *Id.*

WEs are not identifiable by any means other than their attitude toward the death penalty. In fact, a review of one death-qualification voir dire reveals that they are not easily identifiable on that basis. *See Witt*, 105 S. Ct. at 852. It should also be noted that this allegedly distinctive attitude is exactly what justifies their exclusion: they maintain a conscious, articulated and rigidly held refusal to follow the law and the instructions of the court, *see Lockett*, 438 U.S. at 596-97, and their "views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." *Witt*, 105 S.Ct. at 852 n. 5.

The Eighth Circuit's holding is a radical departure from precedent in that it requires that members of a group must be allowed to sit on individual panels. *Contra, Swain v. Alabama*, 380 U.S. 202 (1965). This is despite a well-established and unanimous finding by all other courts that members of the group are not qualified to sit because of their avowed bias against a legally valid punishment and their stated refusal to follow the law.

III.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE ARKANSAS IS JUSTIFIED BOTH (1) IN EXCLUDING JURORS IN THE GUILT PHASE OF A CAPITAL MURDER TRIAL WHO WILL NOT FOLLOW THE LAW IN THE PENALTY PHASE AND (2) IN TRYING BOTH PHASES OF A CAPITAL CASE BEFORE THE SAME JURY.

Among questions left open in *Witherspoon* is the relationship between the interests of the State and the defendant in both phases of a capital murder trial if a showing is made that a "death-qualified" jury is "less than neutral with respect to guilt." *Id.*, 391 U.S. at 520 n. 18. While the State denies that McCree has made such a showing, this Court has recognized that proof of this issue is only one step in the Sixth Amendment analysis. This Court recognized in *Witherspoon* that it then becomes necessary to weigh both parties' interests in an impartial jury.¹

The State's interests have never been properly considered by either the District Court or the Eighth Circuit. In its original opinion remanding this case to the District Court, the Eighth Circuit ignored the necessity of examining the State's interests by stating unequivocally that, if Grigsby made the requisite factual showing, he would have established that "his constitutional rights have been violated and he would be entitled to a new trial." *Grigsby*, 637 F.2d at 527.

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If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. *Witherspoon*, 391 U.S. at 520 n. 18. (Emphasis added)

The Arkansas Supreme Court specifically took issue with the Eighth Circuit's perspective on this aspect of *Witherspoon*. Noting that this Court found "the evidence too tentative and fragmentary" to adopt a *per se* rule, the Arkansas court stated:

We do not take that disposition of the issue to carry an implication that the Court would necessarily have disapproved death-qualified juries if the proof had been complete.

Rector, 280 Ark. at 388. The "general confusion surrounding the application of *Witherspoon*" was one of the grounds for granting certiorari in *Witt*. *Id.*, 105 S. Ct. at 849. The "general confusion" surrounding the application of *Witherspoon* to the *Grigsby* issues is an equally compelling reason to grant certiorari in this case.

In recognizing that *Witherspoon* imposed "a limitation on the State's power to exclude," *Adams v. Texas*, 448 U.S. 38, 48 (1980), this Court reiterated the State's right to exclude jurors who refuse to follow the law. *Id.*, at 45. At the very least, *Witt* reaffirmed this right. *Id.*, at 852. Earlier, *Lockett* specifically held that:

Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge.

438 U.S. 596-97.

Relying on a faulty interpretation of *Witherspoon*, and discounting the impact of *Lockett* and *Witt*, the Eighth Circuit has now created a broad-based rule of mandatory inclusion in total derogation of the State's ability to excuse biased jurors.

The State's interest in exercising its right to exclude "began with a recognition that certain . . . jurors might

frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Witt*, 105 S. Ct. at 851. The State's interest in excusing biased jurors was no less compelling when capital murder trials became bifurcated by mandate of this Court. *Maxwell v. Bishop*, 398 U.S. 262 (1970). Difficulties presented to the State and the juror if WEs are not excluded from guilt phase determinations were recognized by the Fifth Circuit in *Spinkellink*, 578 F.2d at 595-96:

If, because of his scruples, he votes to acquit, he must risk hanging the jury. Similarly motivated votes by other jurors in subsequent trials and retrials could, in effect, result in near immunity from crimes for which the death penalty can be imposed, which would frustrate Florida's interest in the just and evenhanded application of its laws, including its death penalty statute. If the juror votes to convict, he must risk betrayal of his principles should the death penalty eventually be imposed. Even under Florida's bifurcated trial procedure in these cases, the situation would be no less problematic. *Although the juror could be excused from the jury during the sentencing phase of the trial, during the guilt-determination phase he still would know that a vote to convict could eventually mean the death penalty, a result to which he would have contributed, if only indirectly.* His choices as to how to vote on the defendant's guilt or innocence would remain equally troublesome. (Emphasis added)

The State has a legitimate interest in obtaining jurors who can "follow their instructions and obey their oaths" and who "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Witt*, 105 S. Ct. at 850, quoting *Adams*, 448 U.S. at 44-45. (Emphasis added.) Such jurors are not uniquely an interest of the state; an "impartial jury" guaranteed to a defendant consists of just such jurors. *Witt*, 105 S. Ct. at 852.

"Between [a defendant] and the state the scales are to be evenly held." *Swain*, 380 U.S. at 220, quoting *Hayes v.*

Missouri, 120 U.S. 68, 70 (1887). The State does not necessarily seek to "vindicate" its interest in a penalty "at the expense of the defendant's interest in a completely fair determination of guilt or innocence," *Witherspoon*, 391 U.S. at 520 n. 18; rather the State seeks to keep the scales evenly held between itself and a defendant in both phases of a capital murder trial. The State seeks only that to which a defendant is also entitled: an "impartial jury" to determine both guilt or innocence and the appropriate penalty.

The State is justified both in excluding WEs from the guilt phase and in maintaining a one-jury system. Ark. Stat. Ann. §41-1301(3) (Repl. 1977) provides that the same jury which determines guilt shall determine sentence. The difficulty with a two-jury system in a criminal case was well stated in *Rector*, 280 Ark. at 396:

The difficulty . . . is the separation of certain jurors' responsibility for the verdict from their responsibility for fixing the penalty. The two must go hand in hand, else the common law jury system no longer exists.

See also *Smith*, 660 F.2d at 580. The Arkansas court considered in *Rector* the questions of guilt and punishment to be "necessarily interwoven" and analogized this requirement to Arkansas law requiring one jury in civil cases for assessment of both liability and damages. *Id.*, 280 Ark. at 396. That point stands in contrast to the District Court's lone analogy to any use of two juries—the fact that some jurisdictions require two in civil cases. *Grigsby*, 569 F. Supp. at 1323. In short for cogent, articulated reasons, Arkansas procedure requires that one jury sit in all trials—criminal or civil.

It is not the office of federal courts to fashion or overthrow state jury selection methods. *Taylor*, 419 U.S. at 537. A state has broad discretion to prescribe qualifications for its jurors. *Taylor*, 419 U.S. at 538. Even the goal of a fair cross-section is never to be achieved at the cost of leaving

disqualified veniremen on a jury. *Smith*, 660 F.2d 582, quoting *Taylor*, 419 U.S. at 537. The possibility of two juries in a capital case has arisen and been rejected in many state jurisdictions.² This Court should grant certiorari to hold that such a system is not mandated by the Constitution.

A two-jury system is not fair to the State and "perhaps not even to the accused." *Rector*, 280 Ark. at 396. The possibility of violating a capital defendant's constitutional rights by the use of two juries is more fully developed in *Smith*. The concept of "whimsical doubt" was discussed and found persuasive though unnecessary to a decision in that case. *Id.* at 579-582. Should *Grigsby* be affirmed and its mandate adopted, capital defendants will no doubt next pursue this avenue of assault in their continuing quest to thwart the imposition of capital punishment.

Witt recognized that *Witherspoon* represented a "necessary balancing of the accused defendant's rights to a jury panel drawn from a 'fair cross-section of the community' . . . against the traditional right of a party to challenge a juror for bias." Witt, 105 S. Ct. at 852 n. 5. *Grigsby* carries the fair cross-section argument to the impermissible extreme of requiring the inclusion of jurors who frankly avow that they will not follow the judge's instructions on the law. *Id.* The State agrees with the *Grigsby* dissent that no cross-section violation exists; however, if a cross-section interest

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Rector v. State, *supra*; *Coble v. State*, 274 Ark. 134, 140, 624 S.W.2d 421 (1981); *Nettles v. State*, 409 So.2d 85, 86 (Fla. App. 1982) ("no compulsion in law or logic to so structure capital case trials"); *People v. Gaines*, 88 Ill.2d 342, 430 N.E.2d 1046 (1981) (relying on *Adams* in rejecting 2 juries); *People v. Newsome*, 110 Ill. App. 3d 1043, 443 N.E.2d 634, 637 (1982) (questions adoption under current statute and poses constitutional problems); *State v. Jackson*, ____ N.C. ____, 305 S.E.3d 703 (1983); *State v. Ladd*, ____ N.C. ____, 302 S.E.2d 164 (1983); *State v. Bass*, 189 N.J. Super. 461, 460 A.2d 223 (1983); *State v. Hutchinson*, ____ N.M. ____, 661 P.2d 1315 (1983); *Hager v. State*, 665 P.2d 319 (Okla. Crim. App. 1983) (*Witherspoon* does not require two juries, statute prohibits two).

is present, it must be balanced against the State's right to exclude biased jurors in the ultimate quest to seat a jury which can be fair and impartial to both sides. As the Court noted in *Smith*, 660 F.2d at 583, "a cross-section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased."

IV.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE IN HOLDING THAT A "DEATH-QUALIFIED" JURY IS UNCONSTITUTIONALLY BIAS-ED, THE EIGHTH CIRCUIT RELIED ON INHERENTLY UNRELIABLE EVIDENCE AND MISAPPLIED APPLICABLE DECISIONS OF THIS COURT.

In holding that "death-qualified" juries are biased in favor of the prosecution, the Eighth Circuit essentially imputed bias to 81 to 88 percent of eligible jurors. (The court found that 11 to 17 percent of prospective capital jurors would be excluded for cause as WEs and that 1 to 2 percent would be excluded as ADPs. *Grigsby*, slip op. at 8, 24 n. 26.) This imputation of bias is improper as a matter of law. See *Smith v. Phillips*, 455 U.S. 209 (1982); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Dennis v. United States*, 339 U.S. 162 (1949); *United States v. Wood*, 299 U.S. 133 (1936). The holding is also improper because the court relied on pseudo-scientific data as circumstantial "proof" of "facts" which may not be subject to proof under any methodology now available to social science researchers. The difficulty (or folly) of relying on such evidence to "prove anything to the extent which should be necessary to change time-tested legal procedures has been noted by at least five justices of this Court." *Ballew v. Florida*, 435 U.S. 223, 231 ... n. 10, 233 n. 11, 237-39 & nn. 28-32, 242-43 & nn. 34-37 (Blackmun, J., writing for the plurality); *Id.* at 246 & n.* (Powell, J., concurring; *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976) (Stewart, J., writing for the plurality); *Id.* at 233-36 (Marshall, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 354-55 & n. 7 (1976) (White, J., dissenting).

The Eleventh Circuit Court of Appeals recently stated its dissatisfaction with the probative value of social science's studies and surveys. *McClesky v. Kemp*, 753 F. 2d 877 (11th Cir. 1985). The "broad issue before [the court] concern[ed] the role that social science is to have in judicial decisionmaking." *Id.* at 887.

As specific criticisms, the court noted:

(1) the imprecise nature of the discipline; (2) the potential inaccuracies in presented data; (3) the potential bias of the researcher; (4) the inherent problems with the methodology; (5) the specialized training needed to assess and utilize the data competently; and (6) the debatability of the appropriateness for courts to use empirical evidence in decisionmaking.

Id. at 888.

The State presented three social science expert witnesses to testify to basically the same criticisms of McCree's research. They testified that much caution should be used by the courts in adopting the tentative conclusions of social science to mold the law. Even more significantly, they repeatedly pointed out the specific methodological deficiencies in the studies and surveys offered. Their testimony on those issues was virtually ignored.

A. *The research relied upon by the Eighth Circuit compares the wrong groups and cannot be relied upon to reach the conclusion that "death-qualified juries" are more conviction-prone than non-death-qualified juries.*

The Eighth Circuit ultimately concluded that death-qualified juries are unconstitutionally biased because they are more prone to convict than non-death-qualified juries. However, McCree's research tells us absolutely nothing about actual juries at all. It compares only two types of subjects purported to represent DQs and WEs.

The proper comparison cannot be made without accounting for the ADPs, another group excludable for cause by Arkansas law. This would involve a comparison between the DQs and a group composed of all excludable groups—specifically, the WEs and the ADPs. However, the proper comparison may be between the DQs and the combination of DQs, WEs and ADPs who would sit on a non-death-qualified jury. All the data will have to be re-evaluated or the research will have to be redone in order to make the relevant comparisons. Whatever the proper comparisons, McCree's evidence tells us nothing about the guilt-proneness of non-death-qualified juries, so his proof is virtually worthless.

B. *Statistical significance is the "lowest form of proof," and the Eighth Circuit's reliance on that level of "proof" was clearly erroneous.*

The only level of proof proffered by McCree was that of statistical significance, a convention used by social scientists. That is the "lowest form of proof" and certainly does not establish to a legal certainty (or even to a respectable level of probability) the premises advanced by him. Some psychologists have denounced it as virtually worthless as a real measure of proof. Compared to the "hard" sciences, such as physics, the findings of "soft" social sciences are ambiguous and subject to radical change with altered methodology. They are also subject to abandonment as newer theories are advanced.

The very most that can be said of McCree's evidence from a scientific standpoint is that *some* of the studies are statistically significant. Statistical significance as a measure of proof is better than nothing but not much.

C. *If Grigsby's ambiguous evidence "proves" anything, it is that the WEs are biased in being more acquittal-prone than the more open-minded DQs.*

In holding that "death-qualified" juries are conviction prone, the Eighth Circuit relied on evidence which just as clearly establishes that WEs are the biased group and that they are biased in favor of acquittal. A capital defendant is not entitled to an acquittal-prone jury, and the States are justified in removing from both phases of capital trials those prospective jurors who affirmatively state that they will refuse to follow the law and the instructions of the court and to base their verdicts on the law and the evidence. It is for their affirmative refusal to follow the law that the WEs are removed, not their opposition to the death penalty. The Constitution could not possibly mandate that the State seat biased jurors.

D. *The Eighth Circuit's finding that the behavior of real jurors can be predicted from the attitudes of laboratory and survey subjects is clearly erroneous.*

The Eighth Circuit accepted the District Court's finding that the attitudes of laboratory and survey subjects can be relied upon to predict the voting behavior of real jurors. There is little basis to predict even the subject's behavior from their stated attitudes, especially when they have no prior actual experience in the area. It is even less likely that anyone else's behavior could be predicted from the survey subjects' attitudes. Even a cursory examination of a real death-qualification *voir dire* reflects that very few jurors can ever be classified on the basis of their initial responses. Thus, McCree's basic component of analysis, comparison of the subjects' classifications, is very likely to be erroneous.

In short, McCree's entire premise is preposterous when it is relied upon as "proof" to a legal certainty, which should be required before the federal courts intervene in the State's jury selection procedures.

Counsel for Petitioner
**Counsel of Record*

Filed: March 18, 1985

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges.

ORDER

It is ORDERED that the opinion of the court filed January 30, 1985, be amended so that the reference to footnote 34 appears after the word "fix" in the last line of the opinion on page 34 and by adding a footnote 35 at the end of the opinion after the word "modified." All the judges concurring in the opinion of the court concur in the addition of the footnote. Footnote 35 is as follows:

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We do not believe, and the dissenting opinion's final footnote does not argue, that *Wainwright v. Witt*, 53 U.S.L.W. 4108 (Jan. 21, 1985), requires a different result. *Witt* simply elaborates the meaning of the *Witherspoon* standard. It describes further the criteria for deciding whether a juror's opinions justify exclusion. It is not addressed to the separate problems addressed here: (1) whether a jury, once WEs are excluded, is conviction prone and therefore not impartial *on the issue of guilt or innocence*; and (2) whether a death qualified jury meets the cross-sectional representation requirement of the sixth amendment. Some of the footnotes, at least in the dissenting opinion of Justice Brennan, do discuss these questions, but we do not read them as deciding it one way or the other.

It is FURTHER ORDERED that the dissenting opinion be amended by adding a footnote 8 to the final paragraph, which appears on page 48 of the opinion, following the word "impartiality." All of the judges joining in the dissent concur in the addition of the footnote. Footnote 8 is as follows:

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The Supreme Court's recent decision in *Wainwright v. Witt*, 53 U.S.L.W. 4108 (U.S. Jan. 21, 1985), while not controlling in this case, sheds light on a number of issues today considered by the court.

First, *Witt* makes clear that the essential consideration is whether jurors will conscientiously perform their duties in accordance with their instructions and their oath.

[T]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.

53 U.S.L.W. at 4111. As I have argued, this is the proper, relevant consideration. *Supra* at 34, 41-42. Second, the Court's consideration of the *Witherspoon* standard as redefined in *Adams* indicates there is a serious question whether *Witherspoon* can support the recognition of WEs as a distinctive class.

Finally, Justice Brennan's dissent in *Witt* sets forth in some detail the "fair cross-section" arguments enumerated by the court today, including the conclusion of conviction-proneness, and cites numerous authorities relied upon by the court today, including the district court decisions in *Grigsby* and *Keeten*. The majority opinion in *Witt*, however, rejects these views. It observes that the dissent's "exegesis" of *Witherspoon* [sic] "is a latter-day version of a 'fair cross-section' theme barely adumbrated by that opinion," 53 U.S.L.W. at 4111, and notes that the dissent's reasoning regarding the cross-sectional requirement "if carried to its logical conclusion would require that a juror be seated who frankly avowed that he could not and would not follow the

judge's instructions on the law." *Id.* In stating that the Court "adhere[s] to the essential balance struck by the *Witherspoon* decision * * * if not to the version of it presented by today's dissent," *Id.*, such reasoning is rejected.

The language of *Witt* relevant here is the product of a footnote exchange between Justices Rehnquist and Brennan in an opinion which elsewhere deprecates the force of footnotes. 53 U.S.L.W. at 4111. Nonetheless, the discussion in *Witt* gives substantial support to this dissent.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2113

James T. Grigsby,

Appellee,

v.

**James Mabry, Commissioner,
Arkansas Department of
Correction,**

Appellant.

Ardia V. McCree,

Appellee,

V.

Vernon Housewright, Director,
Arkansas Department of
Correction,

Appellant.

Submitted: March 15, 1984

Filed: January 30, 1985

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges.

LAY, Chief Judge.

The issues on this appeal relate to the question left open in *Witherspoon v. Illinois*, 391 U.S. 510 (1968); whether the exclusion of jurors who hold absolute scruples against the death penalty creates a "conviction-prone" jury as to

the guilt of a defendant in a capital case.¹ On an earlier remand from this court, *Grigsby v. Mabry*, 637 F.2d 525 (8th Cir. 1980), the district court held a plenary hearing on the issues involved: (1) whether the sixth amendment right to a trial by jury is violated in capital cases by a jury from which the state has systematically excluded at *voir dire* all persons who hold inflexible scruples against capital punishment and (2) whether exclusion of the *Witherspoon* ex-

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The Supreme Court stated:

The data adduced by the petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

* * *

Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.

Witherspoon, 391 U.S. at 517-18, 520 n. 18 (emphasis original).

cludables (WEs)² during the guilt innocence phase of the trial violates a defendant's fourteenth amendment due process right to a fair and impartial jury. The trial court, the Honorable G. Thomas Eisele, in a learned and exhaustive opinion, found that both the sixth amendment right to have a jury selected from a representative cross section of the community, and the fourteenth amendment due process right to have an impartial jury, were violated. As a result, the trial court ordered that the state of Arkansas, in all capital cases, must hold bifurcated jury trials; first, as to guilt, and second, assuming guilt, as to punishment. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1321-23 (E.D. Ark. 1983).

Based on the overall exhaustive record, we find substantial evidentiary support for the district court's findings. We find that substantial evidence supports the court's finding that a capital jury, with WEs stricken for cause, is in fact conviction prone and, therefore, does not constitute a cross-sectional representation in a given community. In view of our finding on the sixth amendment violation, it is unnecessary to discuss the issue whether the jury in the petitioners' case was in fact a biased jury. We affirm, with modification, the judgment of the district court. We vacate that portion of the district court's judgment which requires the state to utilize two separate juries; one to determine guilt-innocence and another for the penalty phase of the trial. We leave the actual procedural remedy to the discretion of the state.

²

"*Witherspoon* excludables" are those venirepersons "who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." *Witherspoon*, 391 U.S. at 514.

Although this was originally a consolidated proceeding,³ the district court granted a writ of habeas corpus only to the petitioner Ardia McCree. McCree was convicted of capital murder in Ouachita County, Arkansas in 1978. He is presently serving a life sentence without parole. His conviction was affirmed by the Arkansas Supreme Court. See *McCree v. State*, 266 Ark. 465, 585 S.W.2d 938 (1979). In McCree's trial, eight prospective jurors were excused for cause on the ground that they could not impose the death penalty. McCree made a timely objection to the exclusion of WEs in the guilt-innocence phase. Moreover, in the present case, the state expressly has waived any claim of exhaustion of remedies or other procedural bar.⁴

I.

In *Duren v. Missouri*, 439 U.S. 357, 364 (1979), the Supreme Court stated:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive"

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McCree's habeas corpus petition was consolidated with two other petitions, by James Grigsby and DeWayne Hulsey. Grigsby died in his cell in June 1983 and his case is now moot. Hulsey's case was held to be procedurally barred under the rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), since he made no contemporaneous objection to the exclusion for cause of death-scrupled venirepersons. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1276 (E.D. Ark. 1983).

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The state, citing *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983), does argue that McCree was not prejudiced because the evidentiary trial record amply supports a finding of guilt. The prejudice test applied in *Pickens* was related to the failure of *Pickens* to assert a contemporaneous objection at trial. See *Pickens*, 714 F.2d at 1458 n. 2. In *Pickens*, the *Wainwright* rule governed. Here the state has waived any procedural bar and, therefore, at least under the sixth amendment claim, as we discuss, we need not evaluate the issue of prejudice.

group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

And in an earlier opinion, *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975), the Court stated:

[T]he jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

A threshold contention of the state here is that the cross-sectional requirement of the sixth amendment is not applicable to a petit jury. In making this argument the state relies on statements taken from *Duren* that such attack only applies to the panels or venires from which juries are drawn. *Duren*, 439 U.S. at 363-64. Similarly, the state cites from *Taylor* the abstraction that "we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Taylor*, 419 U.S. at 538. The state also argues that this court rejected a sixth amendment attack on a petit jury in *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 744 (1984).⁵

Childress must be read within its factual context. The significant issue in *Childress* was whether an alleged

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We stated in *Childress*:

The extension of *Taylor v. Louisiana* from the venire to the petit jury has much logical and practical appeal. * * * However, the Supreme Court in *Taylor* expressly limited the fair cross section of the community holding to the venire, not the petit jury.

Childress, 715 F.2d at 1319-20.

systematic exclusion of blacks by the prosecution in exercising its peremptory strikes constituted a sixth amendment violation. *Childress*, 715 F.2d at 1314-15. We agree the state may exercise peremptory challenges as it deems necessary. See *Swain v. Alabama*, 380 U.S. 202 (1965); but see *Williams v. Illinois*, ___ U.S. ___, 104 S. Ct. 2364 (1984) (Marshall, J., dissenting); *Gilliard v. Mississippi*, ___ U.S. ___, 104 S. Ct. 40 (1983) (Marshall, J., dissenting). No stated reason is necessary in exercising peremptory challenges. To establish a rule that jurors cannot be stricken by peremptory challenges on certain grounds seeks the impossible and limits the right of a party to eliminate jurors who appear to be biased. A correlative to *Childress* is the concept that no defendant has the right to select biased jurors who he feels might be more sympathetic to his case.

It would, of course, be impossible to obtain a petit jury that reflects all the distinctive groups in a community.⁶ In this sense it is easy to conclude that systematic exclusion, as it relates to the necessity of having a cross-sectional jury, is generally not an issue when dealing with the petit jury. Nevertheless, in given factual instances, the sixth amendment requirement of cross-sectional representation has been held applicable to the petit jury. See *Adams v. Texas*, 448 U.S. 38, 50 (1980); *Ballew v. Georgia*, 435 U.S. 223, 236-37 (1978); *Witherspoon*, 391 U.S. at 518-23. There is no justifiable reason to conclude that a statute which systematically eliminates distinct groups of citizens from sitting on a petit jury would not violate the sixth amend-

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Any implication by the dissent suggesting the majority requires representation of all cognizable groups on each petit jury is misplaced. See *infra* pp. 35, 38-39. Our holding simply forbids the systematic exclusion of any cognizable group from a petit jury.

ment requirement of a representative cross-sectional jury.⁷ We deal here with a right to eliminate *for cause* a distinctive group of prospective jurors. If prospective jurors, who would take an oath to decide a case on the basis of the law and facts presented, could be excluded for cause because they were white or black, or, based on questions elicited on *voir dire*, because they were pro-ERA, pro-life, Republicans or Democrats, such a systematic exclusion from the panel, would encroach upon a party's sixth amendment right to have a cross-sectional jury.

We base our rejection of the state's argument on decisions of the Supreme Court. In *Swain* the Court noted that systematic exclusion from a petit jury of a distinctive group over a long period of time would be wrong. *Swain*, 380 U.S. at 223-24. In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court held that a petit jury of less than six persons would violate a defendant's sixth amendment right to have a cross-sectional representation. *Id.* at 230, 245. See also *Williams v. Florida*, 399 U.S. 78, 100-01 (1970). And finally, *Witherspoon* itself is direct authority that a distinctive group, eliminated for cause from the petit jury, violates the sixth amendment principle that requires a cross-sectional jury. As Justice Stewart noted, in response to the argument that no actual prejudice had been shown: "But it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." *Witherspoon*, 391 U.S. at 518 (our emphasis). The Court went on to state:

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There is no functional difference between excluding a particular group of eligible citizens from the "jury wheels, pools of names, panels or venires from which juries are drawn" and systematically excluding them from sitting on a petit jury. *Duren* and *Taylor* forbid the former explicitly and can be read to forbid the latter implicitly. *Duren*, 439 U.S. at 363-67; *Taylor*, 419 U.S. at 526-31. The result is the same in either case: a distinct group of the citizenry is prevented from being considered for service on petit juries.

Guided by neither rule nor standard, "free to select or reject as it [sees] fit," a jury that must choose between life imprisonment and capital punishment can do little more — and must do nothing less — than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, *a jury composed exclusively of such people cannot speak for the community*. Cull-ed of all who harbor doubts about the wisdom of capital punishment — of all who would be reluctant to pronounce the extreme penalty — such a jury can speak only for a distinct and dwindling minority.

* * *

Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Witherspoon, 391 U.S. at 519-20, 521-23 (footnotes omitted) (our emphasis).

We conclude on the facts of the present case, which involves a challenge for cause, that the state cannot defeat a sixth amendment claim on the ground that we deal only with a petit jury, rather than the jury pool at large.

II.

Turning to the specific elements of the *Duren* test, we find *Witherspoon* also is direct authority that the group of WEs excluded in this case is a distinctive group in the community. *Witherspoon* found a distinctive group in those

venirepersons who were not "automatic-life"⁸ but still had scruples against the death penalty. The district court found "that the [*Witherspoon* excludable] group is of substantial size both nationally and within the state of Arkansas, ranging between 11% and 17% of those eligible for jury service. So the group excluded is both distinct and sizeable."⁹ *Grigsby*, 569 F. Supp. at 1285.

The second element of the *Duren* test relates to venires. However, given our earlier discussion and finding that there is no practical difference between exclusion from the venire and systematic exclusion for cause from the petit jury, we analyze the resultant petit juries. In this case we find the representation of WEs on the juries is not "fair and reasonable in relation to the number of such persons in the community * * *." *Duren*, 439 U.S. at 364. The district court found WEs constitute between eleven and seventeen percent of the population. However, WEs are totally excluded from guilt-innocence juries in Arkansas.

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"Automatic-life" venirepersons are those who, due to their personal objections to the death penalty, would always vote for a life sentence and refuse to consider ever imposing the death penalty. These are the persons *Witherspoon* allows to be excluded from the penalty phase of a capital trial — WEs.

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The district court also found:

Blacks and women constitute significant and distinctive groups of jury-eligible citizens within Arkansas and the Nation. Death qualification results in their systematic disproportionate removal from juries which try the guilt-innocence of persons accused of capital crimes, without adequate justification, in violation of the accused's right to a representative jury comprised of a fair cross-section of the community.

Grigsby, 569 F. Supp. at 1294. Since we find that the exclusion of WEs violates the sixth amendment, we need not pass on the court's finding relating to blacks and women.

Finally, *Duren* requires the petitioners to establish that the WEs are systematically excluded. Here, the district court found the systematic exclusion results from the *voir dire* at trial. *Grigsby*, 569 F. Supp. at 1286. There is little argument offered by the state that in capital cases the exclusion is not systematic.

III.

It is necessary to emphasize that this case concerns only the exclusion of WEs from the guilt-innocence phase of a capital trial. The exclusion of jurors who will never consider a penalty of death, approved in *Witherspoon*, becomes irrelevant when the focus is on the first half of a bifurcated trial;¹⁰ on the guilt-innocence phase, rather than the penalty determination. *Witherspoon* does not hold that jurors unalterably opposed to the death penalty, but who nonetheless can swear to consider the evidence and follow the law in determining guilt, can be excluded from the guilt-innocence phase of a bifurcated trial.¹¹

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Arkansas allows a bifurcated trial by the same jury. Ark. Stat. Ann. §41-1301(3) (1977).

¹¹

The *Witherspoon* court held the state could remove:

those [venirepersons] who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Witherspoon, 391 U.S. at 522-23 n. 21 (emphasis in original). This holding explicitly allows for venirepersons excludable in the penalty phase to be included on the jury determining guilt-innocence.

The state makes much of the argument that a WE participating in the guilt-innocence determination might vote to find a defendant not guilty simply to insure that the death sentence will not be imposed during the penalty phase. This argument has little merit because it overlooks the requirement that the WE must swear to consider the evidence and follow the law in determining guilt, otherwise the WE can be excluded for cause. *We cannot assume a juror who takes the oath will not abide by it.*

The fundamental issue facing the court is whether the evidence supports the district court's finding that a jury with WEs stricken for cause is a conviction-prone jury. If the evidence supports this finding then we feel McCree has established his case that there has been a denial of his sixth amendment right. This conclusion finds analogous support in the *Witherspoon* court's holding that exclusion for cause of venirepersons who opposed the death penalty, but were found not to be automatic-life—i.e., able to consider the evidence and follow the law—created “a tribunal organized to return a verdict of death.” *Witherspoon*, 391 U.S. at 521. Since the district court has exhaustively analyzed this evidence, see *Grigsby*, 569 F. Supp. at 1291-1308, we need only summarize the proofs.

A. Attitudinal and Demographic Surveys

1. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. Colo. L. Rev. 1 (1970). (*Bronson-Colorado*).

The subjects of this study were 718 Colorado venirepersons. Interviews were done by trained students from the University of Colorado in 1968 and 1969. Each subject was asked whether they strongly favored, favored, opposed, or strongly opposed the death penalty. This was followed by five questions regarding attitudes on criminal justice issues. On each of the five questions the survey found the stronger the subjects' support for the death penalty, the stronger their support for positions most favorable to the prosecution.

2. Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 Woodrow Wilson L.J. 11 (1980). (*Bronson-California*).

Two studies similar to the *Bronson-Colorado* survey are grouped together in this article. Trained students inter-

viewed 755 Butte County, California, venirepersons regarding their position on the death penalty. Seven attitudinal questions, much like those used in *Bronson-Colorado*, followed. Once again a direct and significant correlation between death penalty beliefs and criminal justice attitudes was found.

The second survey involved interviews of 707 venirepersons from Los Angeles, Sacramento and Stockton, California. The results were consistent with the prior studies: the more strongly the subjects favored the death penalty, the more likely they were to endorse prosecution positions.

3. Louis Harris & Associates, Inc., *Study No. 2016* (1971).

Harris randomly polled 2,068 adults throughout the United States in 1971. The respondents were asked about their attitudes on the death penalty and other criminal justice issues. The results parallel those of the *Bronson* surveys. In addition, Harris found more blacks than whites, and more women than men, would be excluded from jury service by death qualification.

4. Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 Law & Hum. Behav. 31 (1984). (Fitzgerald-1979).

The survey upon which this article is based was a sample of 811 jury eligible persons in Alameda County, California, in 1979. An independent professional polling organization, Field Research Corporation of San Francisco, drew the sample and interviewed the subjects. Respondents who could not be fair and impartial, i.e., nullifiers, were excluded. Of the remaining 717 subjects, over seventeen percent were found to be WEs. Questions regarding attitudes on criminal justice issues showed that death qualified respondents were more favorable to the prosecution than the WEs.

5. Precision Research, Inc., *Survey No. 1236* (1981). (*Precision Survey*).

This survey was conducted by an Arkansas polling organization in 1981. A sample of 407 adults in the state of Arkansas were asked the same questions used in *Fitzgerald-1979*. The survey found that approximately eleven percent of those who could be fair and impartial in determining guilt-innocence were WEs.

B. Conviction-Proneness Surveys

1. H. Zeisel, *Some Data on Juror Attitudes Toward Capital Punishment* (University of Chicago Monograph 1968). (Zeisel).

In 1954 and 1955 Zeisel questioned jurors who had served on felony juries in Brooklyn, New York, and Chicago, Illinois. The subjects were asked about the first ballot votes of their jury and whether they had scruples against the death penalty. The study controlled for the weight of evidence in each case and found jurors with conscientious scruples against the death penalty voted to acquit more often than jurors without such scruples.

2. W. Wilson, *Belief in Capital Punishment and Jury Performance* (1964) (unpublished). (Wilson).

This study presented 187 college students with written descriptions of five capital cases in 1964. Each student was asked whether he or she had scruples against the death penalty. They were then asked to assume that they were jurors in the five cases. The students without death penalty scruples voted for conviction more often than those with scruples.

3. Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 Harv. C.R.-C.L. L. Rev. 53 (1970).

A set of sixteen written descriptions were given to 100 white and 100 black college students in Georgia. Those without scruples voted to convict in seventy-five percent of cases, compared to sixty-nine percent for those with scruples.

4. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 Harv. L. Rev. 567 (1971). (Jurow).

Audio recordings of two simulated murder trials were played for 211 employees of Sperry Rand Corporation in New York. The subjects filled out questionnaires which measured their attitudes toward the death penalty and various criminal justice issues. The subjects were then asked to listen to each "trial" and vote on guilt-innocence. Those persons who more strongly favored the death penalty were found to be more likely to convict.

5. Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 Law & Hum. Behav. 53 (1984). (Cowan-Deliberation).

This 1979 study began by identifying the WEs in its sample of jury eligible residents of San Mateo and Santa Clara Counties, California. Those WEs who could not be fair and impartial in determining guilt-innocence (nullifiers) were excluded from the sample. The remaining 288 subjects were shown a realistic two and one-half hour videotape of a murder trial. The subjects filled out questionnaires regarding their criminal justice attitudes and were assigned to panels of twelve in order to simulate jury deliberations. Some panels were death qualified, while others included WEs. Ballot forms were filled out by each subject before and after the panel deliberations as a means of examining the quality and importance of the deliberations.

The study found that death penalty attitudes were closely linked to conviction proneness—subjects favoring the death penalty were more likely to convict. In addition, the study concluded that jury panels containing a mix of WEs and death-qualified subjects tended to view all witnesses more critically and remember the facts of the case more accurately than death-qualified jury panels.

C. Other Surveys

1. Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness*, 8 Law & Hum. Behav. 95 (1984). (Thompson-Attitudes).

A videotape of two witnesses' conflicting testimony in a criminal trial was shown to twenty death-qualified subjects and sixteen WEs, all of whom had participated in the Cowan-Deliberation survey. The subjects then filled out a questionnaire regarding the testimony they had viewed. The death-qualified subjects gave answers more favorable to the prosecution than the WEs.

2. Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 Law & Hum. Behav. 121 (1984).

This study investigated the process of death qualification on the jurors who undergo it. A sample of sixty-seven jury eligible residents of Santa Cruz County, California were selected after screening out those who could not be fair and impartial in determining guilt-innocence (nullifiers). The subjects were randomly divided into two groups and shown a realistic two hour videotape of a murder trial. One group, in addition, saw a half-hour of *voir dire* in which prospective jurors were death qualified. The study found that the members of the group which viewed the *voir dire* were more likely to believe the defendant was guilty than members of the other group.

3. A. Young, Arkansas Archival Study (1981) (unpublished). (*Arkansas Study*).

This study consisted of a review of forty-one transcripts of *voir dire*s in capital cases from 1973 to 1981 which were on file at the Arkansas Supreme Court. The survey found that over fourteen percent of the venirepersons were WEs and one-half of one percent were ADPs.¹²

D. Expert Testimony¹³

1. Edward J. Bronson, B.S., J.D., LL.M., Ph.D.

Dr. Bronson is a Professor of Public Law and Political Science at California State University at Chico. He has experience working with a variety of officials in the criminal justice system including prison officials, law enforcement officers, and parole officers. At trial, Dr. Bronson testified for petitioners about his own empirical evidence and evidence developed by others. He discussed how death qualification affects the attitudes and demographic composition of the resulting juries.

2. Craig W. Haney, B.A., M.A., Ph.D., J.D.

Dr. Haney is a Professor of Psychology at the University of California, Santa Cruz. He has conducted research on a

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"ADPs" (Automatic Death Penalty) are venirepersons who would always vote for imposition of the death penalty when a capital defendant has been found guilty.

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Other witnesses beyond the four summarized here testified at the hearing. However, the district court relied most heavily on the testimony of these four witnesses in reaching its conclusions. Thus, we find it unnecessary to discuss the other testimony, most of which merely duplicated or reinforced that of Doctors Bronson, Haney, Hastie, and Shure.

wide range of criminal justice subjects including plea bargaining, eye witness testimony, the effects of television on witness perception, the impact of imprisonment on personality and the effects of *voir dire* on prospective jurors. Dr. Haney's testimony for petitioners concerned the relationship between death penalty attitudes and other criminal justice attitudes. In addition, Dr. Haney presented his study on how death qualification *voir dire* tends to bias the resulting jury against the defendant.

3. Reid Hastie, B.A., M.A., Ph.D.

Dr. Hastie is a Professor of Psychology at Northwestern University. He has focused his research on juries and their decision-making process. In his testimony for petitioners, Dr. Hastie reviewed research on the effect of death qualification on the resulting jury and the quality of that jury's deliberation and fact finding. He also compared the relative conviction proneness of death-qualified and nondeath-qualified juries.

4. Gerald H. Shure, B.S., Ph.D.

Dr. Shure is a Professor of Psychology and Sociology at the University of California, Los Angeles. His research in the field of jury behavior is limited; however, Dr. Shure has considerable expertise in the effects of communication channels in problem solving, bargaining and negotiation, and pacifist behavior. Dr. Shure, in his testimony for the state, critiqued petitioners' studies and offered one of his own.¹⁴

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Arkansas also used Dr. Shure to introduce the "automatic death penalty" (ADP) issue. ADP jurors are at the opposite end of the spectrum from WEs. The state argued that the court should consider the effect of eliminating ADPs, as well as WEs, when considering the conviction proneness of a death-qualified jury. The district court was not sure the ADP issue was properly before it, *Grigsby*, 569 F. Supp. at 1305, but found the group constituted between one and two percent of the general population, *id.* at 1307-08, and concluded the effect of their inclusion or exclusion was negligible, *id.* at 1308.

E. Discussion

After examining all of the surveys and considering extensive testimony, the district court concluded that petitioners had proven a jury with WEs stricken for cause is a conviction-prone jury. *Grigsby*, 569 F. Supp. at 1293-1305. The district court found that "[a]lthough Dr. Shure has made some reasonable criticisms and suggestions concerning the possibility of improving research techniques and better interpretation of existing studies, he has not, in his general comments, successfully impeached the clear thrust and effect of petitioner's [sic] case." *Grigsby*, 569 F. Supp. at 1307. Dr. Shure's own study did not contradict the basic findings introduced by petitioners and he acknowledged there were problems with his results. *Id.* at 1307-08. Indeed, the district court found "[i]n many ways his testimony reinforces that of the petitioners' experts." *Id.* at 1307. Judge Eisele was impressed with the consistency of all evidence in supporting the conclusion that death-qualified juries are conviction prone. *Id.* at 1307, 1322-23.

On appeal, the state challenges petitioners' evidence on many grounds: (1) petitioners compared the wrong groups—WEs versus death-qualified jurors; (2) petitioners succeeded in showing only that WEs are biased because they are more acquittal prone than death qualified jurors; and (3) the behavior of jurors cannot be predicted on the basis of the studies and testimony presented. Moreover, Arkansas complains that much of the evidence was based on statistical significance, which the state calls "the lowest form of proof."

Arkansas' first argument is based on the fact that some of the early studies do not identify WEs or properly differentiate between WEs and death-qualified jurors. In addition, the state contends petitioners have failed to account for ADPs. Of course the pre-*Witherspoon* studies did not specifically identify WEs, nonetheless they do show that

death penalty attitudes are directly related to general criminal justice attitudes and conviction proneness.¹⁵ The later studies identified WEs properly and their results were consistent with the earlier ones.¹⁶ Later studies also identified ADPs and found the to be a negligible group.¹⁷ For this reason we are not limited in our conclusions the way the California Supreme Court was in *Hovey v. Superior Court*, 28 Cal. 3d 1, 63-64, 616 P.2d 1301, 1343-44, 168 Cal. Rptr. 128, 170-71 (1980).¹⁸

The focus on particular groups of jurors does give insight into the difference between a death-qualified jury and a normal criminal jury. The state argues that the comparison should center on the two types of juries rather than the characteristics of WEs and death-qualified jurors. However, by examining and defining the elements of the normal criminal jury which are missing on a death-qualified

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See *Bronson-COLORADO; Juror; Wilson; Zeisel; Louis Harris & Associates, Inc., Study No. 3016* (1971).

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See *Cowan-Deliberation; Fitzgerald-1979; Thompson-Attitudes; Precision Survey*.

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See *Juror; Arkansas Study; Louis Harris & Associates, Inc., Study No. 814002* (1981). Dr. Shure's own survey identified 33% ADPs, but he admitted this figure was "off the map" and stated: "I just can't believe the number of ADPs here * * * I do believe our figures are inflated and I don't understand why." *Grigsby*, 569 F. Supp. at 1307-08. The district court considered all the evidence and concluded "the number of those who would automatically vote for the death penalty in Arkansas and nationwide is negligible when compared to the number of those who would never under any circumstances vote for the death penalty." *Id.* at 1308.

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In *Hovey* no evidence was presented regarding the size of the ADP group nor the effect of excluding them, as well as WEs, from the petit jury.

jury—the WEs and ADPs—reasonable conclusions about the differences between the two juries can be drawn. In addition, one study did compare death-qualified with nondeath-qualified panels.¹⁹

Arkansas next echoes the Fifth Circuit's argument²⁰ that the only thing the evidence shows is WEs are acquittal prone. The state contends petitioners have not proved death-qualified juries are necessarily biased. First, we must note the systematic exclusion of any distinct qualified group from jury service violates the cross-sectional requirement of the sixth amendment whatever the bias of that group. As we discussed previously, WEs who can follow the law and fairly try guilt-innocence are a distinct qualified group. Second, the state ignores its own previous argument that the proper comparison is not between WEs and death-qualified jurors but, instead, between a normal criminal jury and a death-qualified jury. The evidence presented by petitioners amply supports the district court's finding that death-qualified juries are more conviction prone than a normal criminal jury.

Arkansas also contends that the behavior of real jurors cannot be predicted from the studies presented by petitioners. However, some of the studies included real jurors,²¹ and one involved a realistic simulation of jury deliberations.²² The state of California raised the same

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See *Cowan-Deliberation*.

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See *Smith v. Balkcom*, 660 F.2d 573, 579 (5th Cir. 1981), modified, 671 F.2d 858, cert. denied, 459 U.S. 882 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 593-94 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

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See *Bronson-California*; *Bronson-Colorado*; *Zeisel*.

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See *Cowan-Deliberation*.

objection in *Hovey* and it was flatly rejected. *Hovey*, 28 Cal. 3d at 61-62, 616 P.2d at 1342, 168 Cal. Rptr. at 169. Furthermore, it is the courts who have often stood in the way of surveys involving real jurors²³ and we should not now reject a study because of this deficiency.

Finally, Arkansas complains about the court's reliance on social science data and belittles its statistical significance. Other courts have accepted some of the studies presented here and similar social science data. See *Keeten v. Garrison*, 578 F. Supp. 1164, 1171-77 (W.D.N.C.), rev'd, 742 F.2d 129 (4th Cir. 1984); *Hovey*, 28 Cal. 3d at 26-60, 616 P.2d at 1314-41, 168 Cal. Rptr. at 141-68. Moreover, in *Witherspoon*, the Supreme Court invited development of this type of evidence. *Witherspoon*, 391 U.S. at 517, 520 n.18. In other sixth amendment cases the Supreme Court has relied on similar data. See *Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978); *Colgrove v. Battin*, 413 U.S. 149, 158-60 (1973); *Williams v. Florida*, 399 U.S. 78, 101-02 (1970). All of the studies introduced were consistent in their conclusions that death penalty attitudes are related to criminal justice attitudes and conviction proneness. Arkansas introduced no contrary studies. The consistency over a wide range of survey methods and respondents is impressive. The state's attack is not well founded. The district court's finding of fact that a petit jury without WEs is "conviction prone" and, therefore, not an impartial or cross-representative jury is not clearly erroneous.

The state raises two additional issues which merit discussion. First, the question is raised whether or not those who are not WEs, but still possess scruples against the death penalty, will adequately represent WEs on the jury so as to nullify the argument that the jury is conviction

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See *Juror* at 576-77.

prone or not cross-representative. The second question is whether the fact that ADPs are excluded from the jury in Arkansas undermines the studies relied upon by the district court. *Cf. Hovey*, 28 Cal. 3d at 63-69, 616 P.2d at 1343-47, 168 Cal. Rptr. at 170-74.

The district court rejected both arguments. We agree with its conclusions. In considering the first argument, the court addressed our holding in *United States v. Olson*, 473 F.2d 686 (8th Cir.), cert. denied, 412 U.S. 905 (1973), and found there was no evidence in that case to suggest that the criminal justice attitudes of the excluded eighteen to twenty year old group would not be represented by other eligible jurors. *Grigsby*, 569 F. Supp. at 1282-83. By contrast, in this case, the district court found that one element of the WEs' distinctiveness as a group is that no other group of death-qualified jurors shared their attitudes or perspectives. *Id.* at 1283. The court considered petitioners' attitudinal studies and concluded: "[s]uch evidence undercuts the idea that the mildly scrupled jurors who are not excluded under *Witherspoon* would adequately represent the attitudes of those who are excluded under *Witherspoon*." *Id.*

Turning to the second argument, the district court noted "the State, by embracing the ADP issue, has effectively conceded the validity of the a priori, gut feelings of all who actively and routinely participate in jury cases in nisi prius courts—the 'fireside induction'— that WEs are acquittal prone and ADPs are conviction prone." *Id.* at 1306. The court also pointed out that the present case can be distinguished from *Hovey* because "the Court in *Hovey*, like the United States Supreme Court in *Witherspoon*, did not feel that it had adequate empirical data before it to permit it to deal with the important constitutional issues at stake." ²⁴ *Id.* In this case the ADP issue was

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See *Hovey*, 28 Cal. 3d at 64-65, 616 P.2d at 1343-44, 168 Cal. Rptr. at 170-71.

squarely addressed and both expert testimony and an empirical study were introduced by the state. The district court found that neither significantly undermined the studies presented by petitioners. *Id.* at 1307-08. Furthermore, Arkansas' expert admitted there were basic deficiencies in his survey. *Id.* The court concluded the number of ADPs was negligible and found that their removal from a death-qualified jury "contributes only to the appearances of fairness." ²⁵ *Id.* at 1308.

In upholding the district court's finding based upon the evidentiary record we must note: (1) the record here is exhaustive; it is difficult to perceive how any petitioner could make a record and an objection to death-qualified juries, as constituting an improper jury for the determination of guilt-innocence, more complete than that presented here; and (2) there are no studies which contradict the studies submitted; in other words, all of the documented studies support the district court's findings.

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The ADP issue was raised in *Adams v. Texas*, 448 U.S. 38, 49 (1980), and the Supreme Court found it insubstantial.

IV.

Only a few cases have been decided with a similar question. We note *Hovey* in California,²⁶ the Fifth Circuit cases of *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982), and *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), and the well-written opinion of Judge McMillan of the district court in North Carolina, *Keeten v. Garrison*, 578 F. Supp. 1164 (W.D.N.C.), *rev'd*, 742 F.2d 129 (4th Cir. 1984). We are very much aware

26

28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). The California Supreme Court considered Hovey's claims that (1) his death-qualified jury was not neutral, but, rather, conviction prone; and (2) the *voir dire* procedure tends to make the resulting jury less neutral and more conviction prone. On the first issue, the court accepted and considered some of the same studies presented in this case. *Id.* at 26-60, 616 P.2d at 1314-41, 168 Cal. Rptr. at 141-68. It noted that Hovey failed to account for ADPs and presented no evidence regarding the size of this group. *Id.* at 64, 616 P.2d at 1344, 168 Cal. Rptr. at 171. Furthermore, the court stated that Hovey failed to show the exclusion of WEs resulted in the exclusion of any particular attitudes or perspectives from the jury. *Id.* at 68, 616 P.2d at 1346, 168 Cal. Rptr. at 173. Thus, the court concluded that Hovey failed to prove a California death qualified jury was not neutral. The court stated: "Therefore, until further research is done which makes it possible to draw reliable conclusions about the nonneutrality of 'California death-qualified' juries in California, this court does not have a sufficient evidentiary basis on which to bottom a constitutional holding under *Witherspoon* and *Ballew*." *Id.*, 616 P.2d at 1346, 168 Cal. Rptr. at 173-74. In the present case, petitioners have shown that ADPs constitute between one and two percent of the population. *Grigsby*, 569 F. Supp. at 1307-08. Petitioners have also shown that the attitudes and perspectives of WEs are not represented by any other group of eligible jurors and are, thus, excluded from death-qualified juries. *Id.* at 1283.

Addressing Hovey's second contention, the California Supreme Court concluded that *voir dire* for death qualification does tend to bias the resulting jury against the defendant and make it conviction prone. *Hovey*, 28 Cal. 3d at 70-73, 616 P.2d at 1347-50, 168 Cal. Rptr. at 174-77. Thus, the court held that individualized sequestered *voir dire* should be required in order to "minimize the untoward effects of death-qualification * * *." *Id.* at 80, 618 P.2d at 1353, 168 Cal. Rptr. at 181.

that our affirmance of the district court here creates a conflict among circuits; this is an important issue since the decision relates to hundreds of prisoners now on death row. We are hopeful the Supreme Court will grant a writ of certiorari and resolve the issue.²⁷ However, in doing so, it is our hope that the Supreme Court will agree with this court that the record is no longer fragmentary and now presents the issue with proofs adequate for review.

Nonetheless, although we are not fully cognizant of the records presented in *Spinkellink* and *Keeten*, in all due respect, we cannot follow the reasoning of our sister circuits. First, and foremost, it would appear that *Spinkellink*, without an evidentiary record, concluded as a matter of law that there can be no constitutional violation.²⁸ See *Spinkellink*, 578 F.2d at 593-98. As we will discuss, we disagree and feel this approach forecloses the invitation within *Witherspoon* that a litigant "in some future case might still attempt to establish that the jury was less than neutral with respect to guilt." *Witherspoon*, 391 U.S. at 520 n. 18 (emphasis original). The reasoning of *Spinkellink*,

27

The state of Arkansas has argued our holding today would be contrary to recent Supreme Court decisions. In its reply brief, Arkansas directed our attention to four particular cases, in addition to *Witherspoon*. It has also argued that *Adams v. Texas*, 448 U.S. 38 (1980), supports the state's position. As we discussed previously, *Witherspoon*, did not decide the issues presented in this case. On the contrary, *Witherspoon* explicitly left these issues open. *Witherspoon*, 391 U.S. at 517-18, 520 n. 18. We have examined the other cases cited by Arkansas and conclude that none of them resolve the important sixth amendment issue we address today.

Arkansas asserts *Adams* held, *sub silentio*, that WEs can be excluded from the guilt-innocence phase as well as the penalty determination. There is no language in the opinion which supports this contention. The Court focused on the penalty questions which, under Texas law, the jury must answer affirmatively in order to sentence a defendant to death. *Adams*, 448 U.S. at 40-41, 46, 50. The Court gave no indication it was addressing or deciding the issue *Witherspoon* had expressly left open. *Adams* does support the proposition that a state may exclude jurors who will not abide by their oath. *Id.* at 44, 46, 50. However, that is not an issue

in the present case. We agree, and petitioners do not dispute, that Arkansas may exclude jurors who will not take the oath and decide guilt-innocence on the basis of the law and evidence presented. But the state cannot assume a juror with scruples regarding the death penalty will violate the oath and refuse to follow the law. *Adams* holds that the state cannot exclude venirepersons simply because their attitudes toward the death penalty may affect their deliberations on issues of fact. *Id.* at 46-47, 49-51.

Lockett v. Ohio, 438 U.S. 586 (1978), is entirely consistent with our holding today. In that case the trial judge "asked whether any of the prospective jurors were so opposed to capital punishment that 'they could not sit, listen to the evidence, listen to the law, (and) make their determination solely upon the evidence and the law without considering the fact that capital punishment' might be imposed." *Id.* at 595. Four venirepersons indicated they could not. The judge then asked each of the four whether they could take the oath "to well and truly [sic] try this case . . . and follow the law * * *." *Id.* On two occasions, each of the four explicitly stated he or she could not take the oath. *Id.* at 596. The Supreme Court concluded:

Each of the excluded veniremen in this case made it "unmistakably clear" that they could not be trusted to "abide by existing law" and "to follow conscientiously the instructions" of the trial judge. * * * They were thus properly excluded under *Witherspoon*, even assuming, *arguendo*, that *Witherspoon* provides a basis for attacking the conviction as well as the sentence in a capital case.

Id. (citation omitted). Of course, the Court had to "assume *arguendo*" that *Witherspoon* allowed an attack on the conviction because *Witherspoon* explicitly did not decide that issue.

In *Maggio v. Williams*, ___ U.S. ___, 104 S.Ct. 311 (1983), the Court vacated the stay of Williams' execution because it was based on his second petition for a writ of habeas corpus which the district court found "frivolous and without merit." *Id.* at 312. The Fifth Circuit had affirmed the district court's denial of the petition. In passing, the Supreme Court commented on Williams' sixth and fourteenth amendment claims, finding "the evidence proffered by Williams on the question whether the jury was less than neutral with respect to guilt [was] tentative and fragmentary, and we cannot conclude that [the district court] abused its discretion in refusing to hold an evidentiary hearing on this issue." *Id.* at 314. It is important to note that the Court did not indicate the issue itself lacked merit, but only that Williams' claim had no merit. In fact, two justices explicitly indicated that the issues raised in *Grigsby* do have merit. *Id.* at

321 n. 7 (Brennan, J., dissenting). See also *Rector v. Arkansas*, ___ U.S. ___, 104 S. Ct. 2370 (1984) (Marshall, J., dissenting); *Woodard v. Hutchins*, ___ U.S. ___, 104 S.Ct. 752, 754-55 (1984) (Brennan, J., dissenting); *Knighton v. Maggio*, ___ U.S. ___, 105 S. Ct. 32 (1984) (Brennan, J., dissenting). In the instant case the evidence presented was neither tentative nor fragmentary and we conclude that venirepersons were excluded on a broader basis than required by *Witherspoon*.

Sullivan v. Wainwright, ___ U.S. ___, 104 S. Ct. 450 (1983), also involved a second petition for a writ of habeas corpus which was denied by the district court and affirmed by the Eleventh Circuit. The case reflects the Supreme Court's general policy of avoiding multiple reviews of successive writs of habeas corpus in capital cases, rather than the Court's considered judgment on the merits of the sixth amendment claim we address today. *Id.* at 452. The Court did state Sullivan's claim that the jury was biased in favor of the prosecution was found meritless, but the implication is not that *Witherspoon* precluded the claim; rather, it appears no evidence ever was presented to substantiate the merits of Sullivan's claim. *Id.* at 451.

Woodard v. Hutchins, ___ U.S. ___, 104 S.Ct. 752 (1984), is very similar to *Sullivan*. Once again the Court was faced with successive writs of habeas corpus and multiple reviews in a capital case and the Court acted quickly to vacate the stay of execution. *Id.* at 752-53. Two justices expressed their view that petitioners must show actual bias on their particular juries to make out a claim of non-neutrality. *Id.* at 754 (Rehnquist, J., concurring). However, another justice indicated that the claims raised in *Grigsby* have merit. *Id.* at 754-55 (Brennan, J., dissenting). Justice Marshall, as noted previously, has expressed a similar view. *Rector*, 104 S.Ct. at 2370 (Marshall, J., dissenting).

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In *Witherspoon*, the Supreme Court addressed the sixth amendment issue of whether the death-qualified jury is cross representative as a question of fact, rather than law, and refused to resolve it on the basis of the "tentative and fragmentary" evidence before the Court. *Witherspoon*, 391 U.S. at 517-18. See also, *Maggio v. Williams*, ___ U.S. ___, 104 S.Ct. 311, 314 (1983). The Supreme Court also treated the sixth amendment issue raised in *Ballew* as a question of fact. *Ballew*, 435 U.S. at 231-39.

Similarly, the California Supreme Court recognized the question whether the exclusion of WEs from the guilt-innocence phase of a capital trial violates the defendant's sixth amendment right is a question of fact, not law. *Hovey*, 28 Cal. at 26-60, 616 P.2d at 1314-41, 168 Cal. Rptr. at 141-68.

however, was adopted by the Fourth Circuit in *Keeten*, despite the fact that the court had before it an evidentiary record somewhat modeled after the trial here. See *Keeten*, 742 F.2d at 133-34.

We feel the reasoning of *Spinkellink* and *Keeten* fails to analyze or decide the fundamental issue. In *Spinkellink* the court observed:

The petitioner complains of jury partiality. He alleges that the * * * "death-qualified" jury that [tried him] was "prosecution-prone." From this he concludes, by implication, that a nondeath-qualified jury * * * would be impartial with respect to the question of guilt or innocence. This is not necessarily so. When the petitioner asserts that a death-qualified jury is prosecution-prone, he means that a death-qualified jury is more likely to convict than a nondeath-qualified jury. Proof that this proposition is true is far from conclusive, but for the moment we will assume its validity. Even if it is true, the petitioner's contention still must fail. That a death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant.

Spinkellink, 578 F.2d at 593-94 (footnotes omitted).

We think this not only closes the door, as a matter of law, for a petitioner to present an empirical record to the contrary, but also fails to understand the fundamental issue.²⁹

In adopting this reasoning, the *Keeten* court followed *Spinkellink* and added that "members of the venire who are irrevocably opposed to capital punishment would engage in jury nullification if permitted to sit at the guilt stage of a capital case and, therefore, would not be impartial fact finders."³⁰ *Keeten*, 742 F.2d at 133. And, in rejecting the due process claim, the court again followed *Spinkellink*'s faulty reasoning:

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In a recent article, Professor Samuel Gross, one of petitioners' counsel, noted:

If the prosecutor had not asked for the death penalty, *Spinkellink* would not have been tried by a death-qualified jury; did the Fifth Circuit really mean that the prosecutor is entitled to increase his chances of getting a conviction by putting the defendant's life at issue? The court tries to support its position by condemning non-death-qualified juries as "defendant-prone" [578 F.2d at 597], but the charge makes no sense: these are the very juries that try all non-capital crimes. Far from being biased, such juries, representing the entire range of community attitudes [sic] and subject to no extraordinary selection procedures, are the yardstick by which the behavior of death-qualified juries must be measured.

Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 Law & Hum. Behav. 7, 13 (1984).

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This is what is termed the "nullifier" problem. However, petitioners do not claim such persons should be allowed to sit on juries and the *Keeten* court's observation is not a proper basis on which to ground its holding. Nullifiers are persons who refuse to follow the law and consider the evidence in the case. These persons would not take the oath to fairly and impartially try the case. If a juror takes the oath, the court cannot assume the juror will not follow it. The Fourth Circuit simply assumes that persons "irrevocably opposed to capital punishment" can never be fair or impartial in the determination of guilt.

The fact that a death-qualified jury may be more conviction prone than one which includes jurors strongly opposed to the death penalty does not demonstrate which jury is impartial. Rather, "[i]t indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant." *Spinkellink v. Wainwright*, 578 F.2d at 504.

Keeten, 742 F.2d at 134.³¹ This analysis misses the point. The issue is not whether a jury would be biased one way or the other, but whether an impartial jury can exist when a distinct group in the community is excluded by systematically challenging them for cause. As the district court noted, the petitioners were not seeking a jury composed entirely of WEs; what petitioners sought was a "jury drawn from the entire cross section of the community as a whole, including both those who strongly favored the death penalty and those who strongly opposed it." *Grigsby*, 569 F. Supp. at 1311.³²

Judge James McMillan, one of America's most distinguished trial judges, observed in the district court opinion in *Keeten*:

Common sense suggests that people who favor the death penalty are more likely to convict defendants charged with capital crimes, and that people who do not favor the death penalty are less likely to convict defendants charged with capital crimes. The Supreme Court recognized those contentions in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), but prudently did not then adopt them as a basis for decision because of the lack of sociological testimony, juror opinion polls and other evidence.

Such evidence has now been developed and occupies hundreds of pages of the record of these cases.

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The Fourth Circuit also relied on *Smith v. Balkcom*, 660 F.2d 573, 579 (5th Cir. 1981), modified, 671 F.2d 858, cert. denied, ___ U.S. ___, 103 S. Ct. 181 (1982) which stated:

The guarantee of impartiality cannot mean that the state has a right to present its case to the jury most likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury most likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury least likely to convict or impose the death penalty, nor that the defense must present its case to the jury least likely to find him innocent or vote for life imprisonment. * * * The logical converse of the proposition that death-qualified jurors are conviction prone is that nondeath-qualified jurors are acquittal prone, not that they are neutral.

The problem is that the court focused on the wrong issue. The issue is not whether nondeath-qualified jurors are acquittal prone or death-qualified jurors are conviction prone. The real issue is whether a death qualified jury is more prone to convict than the juries used in noncapital criminal cases—juries which include the full spectrum of attitudes and perspectives regarding capital punishment. The fact that the state charges a defendant with a capital crime should not cause it to obtain a jury more prone to convict than if it had charged the defendant with a noncapital offense.

One commentator has noted:

Underlying the Fifth Circuit's concerns may be the suspicion that "automatic life imprisonment" jurors may really be "automatic acquittal" jurors, although they swear at voir dire that they are not. However, any such suspicion could not alone justify the exclusion of these jurors consistent with the explicit holding of *Witherspoon* and *Adams v. Texas*, 448 U.S. 38 (1980),] that the factual basis for a venireperson's exclusion on account of death penalty attitudes must be "unmistakably clear." * * * Moreover, if death penalty opponents constitute a cognizable class for sixth amendment cross-section purposes, * * * the exclusion of these jurors based on such suspicion would also violate the *Taylor-Duren* prohibition of the use of rough rules of thumb in the jury selection context.

Indeed, if the Fifth Circuit's view is correct, prosecutors presumably should be able to interrogate venirepersons in non-capital cases (assuming that their prosecution proneness would apply there as well concerning their view on the death penalty, and remove for cause those who could never impose it. Nowhere, however, is this allowed. Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 Crime & Delinquency 512, 514 (1980) (The process of "death qualification" is "unique to capital cases. In no other instance are prospective jurors systematically queried about their attitudes toward a particular legal punishment and then excluded, as a matter of law, depending on how they answer.")

Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 59 n. 199 (1982).

32

Professor Winick commented on the Fifth Circuit's argument against a cross-representational jury at the guilt-innocence phase of a capital trial:

The Fifth Circuit has raised a more fundamental objection to inclusion of [WEs] even in a bifurcated trial system. In its view, a jury that included this group, rather than being neutral, might be biased in favor of the defendant, and therefore deny to the state its right to an impartial jury. This conclusion appears inconsistent with *Witherspoon's* central holding that exclusion of "oppose death penalty" jurors results in an unconstitutionally death-prone jury. As applied to *Witherspoon's* facts, the Fifth Circuit approach would presumably call for affirmance of *Witherspoon's* death sentence on the basis that juries including "oppose death penalty" jurors are more life imprisonment-prone than death-qualified juries, and therefore biased in favor of the defendant. But *Witherspoon* explicitly rejected this contention in favor of a jury that the Court deemed more impartial than one which excludes all death penalty objectors. *Witherspoon* thus suggests that if a capital jury resembling the jury that sits in the typical noncapital case — universally regarded as fair and impartial — is found to be significantly less conviction-prone than a death-qualified jury, then the latter would be constitutionally suspect as a trier of the defendant's guilt.

Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 59-60 (1982).

A fair jury has not been provided when the prosecutor is able to keep on the jury those persons most likely to convict and to exclude from the jury for cause all those persons most likely to acquit.

Nor does a jury so constituted represent, even in theory, a representative cross-section of the community.

Keeten, 578 F. Supp. at 1167.

V.

One last point urged by the state is that McCree should not succeed because there is no showing of actual prejudice. In a sixth amendment claim prejudice is not an element of proof. See, e.g., *Duren v. Missouri*, 439 U.S. 357 (1979); *Ballew v. Georgia*, 435 U.S. 223 (1978); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972). The underrepresentation of a distinct group from a petit jury brought about by systematic challenge for cause affects the integrity of the entire jury system and no actual prejudice need be shown.

The district court recommended a bifurcated trial with two juries. In a subsequent opinion the Arkansas Supreme Court found this to be impractical and the worst of all solutions. *Rector v. State*, 280 Ark. 385, 396, 659 S.W.2d 168, 173 (1983).³³ We think the procedure to be followed to secure an impartial jury in the guilt-innocence phase of a trial should be left to the states. In this regard, we modify the district court's requirement that the state utilize separate juries in a bifurcated trial. Other alternatives are apparent: selecting enough alternate jurors at the outset to replace WEs at the

33

The Arkansas Supreme Court was quite critical of the district court's decision. However, the *Rector* opinion fails to discuss the sixth amendment issue we decide today. 280 Ark. at 393, 659 S.W.2d at 172. But see the concurrence of Justice Purdie, 280 Ark. at 400-01, 659 S.W.2d at 175-76, which is consistent with our opinion in the present case.

penalty phase; shifting the sentencing duty to the judge; or using an advisory jury at the penalty phase which need not be unanimous in its recommendation. We have no doubt that, when put to the challenge, the state will be able to construct a fair process which guarantees each defendant's sixth amendment rights.

Since Arkansas already has a bifurcated trial in capital cases perhaps the best possible procedure, rather than have two separate juries, would be to add to the number of alternates who sit in the guilt phase of trial. If the defendant is convicted a new *voir dire* could take place and the same jury could be qualified, with WEs excluded, to hear the penalty phase of the trial. As another alternative the WEs could be identified at the initial *voir dire* and a sufficient number of alternates retained to take their place on the sentencing jury. We note, however, the California Supreme Court has concluded this form of *voir dire* tends to bias the jury. *Hovey*, 28 Cal. 3d at 70-73, 616 P.2d at 1347-50, 168 Cal. Rptr. at 174-77. We need not pass upon that issue at this time. Neither procedure should significantly affect the cost or efficiency of the trial.

We therefore modify the district court's direction, to the extent it mandated a bifurcated trial with two juries, but otherwise find the writ should be issued unless the state begins proceedings to re-try McCree within such reasonable

time as the district court may fix. Judgment affirmed as modified.³⁴

JOHN R. GIBSON, Circuit Judge, with whom ROSS, FAGG and BOWMAN, Circuit Judges, join, dissenting.

The court today concludes that a defendant's sixth amendment right to have a jury that reflects a representational cross-section of the community is violated when at *voir dire* those persons who would refuse to consider capital punishment are excluded for cause. The case before us essentially involves the refusal of such jurors to follow Arkansas law and consider the full range of penalties it pro-

34

We note that if the state of Arkansas decides to re-try petitioner McCree it cannot seek the death penalty. *Bullington v. Missouri*, 451 U.S. 430 (1981). Therefore, the jury in any retrial will not be death qualified at *voir dire*. Instead, McCree's guilt or innocence will be determined by a normal criminal jury drawn from a representative cross-section of the community. Under today's holding, this is what McCree would have been entitled to at his original trial on the guilt-innocence issue.

In its brief, the state has raised a concern about the possible retroactive application of our decision. There is no reason to decide that issue on the facts of the case before us. We decline to speculate as to the proper resolution of that issue and believe that *Wainwright v. Sykes*, 433 U.S. 72 (1977), will prevent most prisoners from raising it.

vides, specifically the death penalty.¹ As the sixth amendment does not require the representation of such jurors, I respectfully dissent.

I.

At the outset, I note that decisions of the Supreme Court have found only a sixth amendment right to have a jury selected from a representational cross-section. The court today goes to extreme lengths to hold that the cross-sectional requirement applies to petit juries as well as to venires or panels. The court recognizes that *Duren* and *Taylor* prohibit only exclusion of cognizable classes from jury wheels, panels, or venires. E.g., *Taylor*, 419 U.S. at 538 ("no requirement that petit juries actually chosen must mir-

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In McCree's case, the live controversy before us, the voir dire of the jury panel included the following questioning:

THE COURT: Now, ladies and gentlemen, as I read to you earlier, the charge in this case. I also read to you the penalty. The possible penalties are death by electrocution or life imprisonment without parole. Now are there any of you who would refuse under any circumstances to consider all of the penalties that are provided by law?

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JUROR McDONALD: I'm Deloyse McDonald. It would violate my conscience to issue a death penalty.

THE COURT: If you were selected to serve on this jury would you refuse under any circumstances?

JUROR McDONALD: Yes, sir.

THE COURT: To impose the death penalty

JUROR McDONALD: Yes.

The questioning and responses of other members of the jury panel were similar to this exchange.

ror the community and reflect the various distinctive groups in the population"). Thus, it must argue that "there is no functional difference" between exclusion from the various jury groups and that *Duren* and *Taylor* "implicitly" forbid exclusion from the actual jury. *Supra* at 6. Two functional differences, however, exist. Peremptory challenges are made, not to members of the jury panel, but to persons who otherwise would become actual petit jurors, and petit jurors alone must swear to view the trial fairly and impartially and to render a verdict in accordance with the law of the case. Further, the court's conclusion conflicts with the law of this circuit as stated in *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), *vacated on other grounds*, 392 U.S. 651 (1968). There Judge (now Justice) Blackmun discussed in detail the jury selection process and rejected an argument that the exclusion of persons opposed to the death penalty "served improperly to produce a panel which was something less than representative of the community." *Id.* at 725. The court concluded that the "point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn." *Id.* The court today thus blurs the distinction between jury panels and actual juries, in contravention of reality and legal precedent.

II.

The court's decision in this case rests solely on its sixth amendment analysis. *See supra* at 3, 32.² The basic question, therefore, is whether persons who would refuse to consider or who have inflexible scruples against capital punishment (*Witherspoon* excludables or WEs) are a distinctive group underrepresented because of systematic exclusion. The court today finds that "*Witherspoon* * * * is direct authority that the group of WEs excluded in this case is a distinctive group in the community," *supra* at 8, and cites no other authority for this conclusion. *Witherspoon*, however, was not a sixth amendment case, and, in fact, the trial in *Witherspoon* occurred before the decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), which first held the sixth amendment guarantee of jury trial applicable to the states. To say, as the court does today, that the fundamental issue is whether "the evidence supports the district court's fin-

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Judge Eisele's holding was based on two constitutional defects: denial of a cross-section and creation of conviction prone juries. The majority opinion constructs a curious merger of these two concepts, holding that a death qualified jury is an invalid cross-section because it is conviction prone. *Supra* at 3.

Regardless of what constitutional principle the majority opinion is ultimately based upon, the district court erred in finding that McCree was entitled to relief on the ground that death-qualified juries are conviction-prone. McCree failed to demonstrate "actual bias" on the part of the jurors that convicted him. *See Woodward v. Hutchins*, 104 S. Ct. 752, 754 (1984) (Rehnquist, J., concurring); *Smith v. Phillips*, 455 U.S. 209, 216-17 (1982); *Dennis v. United States*, 339 U.S. 162, 167-68 (1950).

A simple example shows the dangers of forsaking the "actual bias" requirement for reliance on hypothetical studies. The district court concluded the studies established that "one consistent and inevitable result of the death-qualification process is the disproportionate exclusion of blacks and women." 569 F. Supp. at 1283. The limited data in the record disproves this "inevitable" conclusion. Following voir dire, eight individuals (five men and three women) were struck for cause solely because of the *Witherspoon* inquiry. Based on the gender figures for the group (11 men and 13 women), women (23.1%) were excluded for their death scruples half as frequently as men (45.5%).

ding that a jury with WEs stricken for cause is a conviction-prone jury," *supra* at 10, is to leap over and summarily assume what is not true: that WEs are a distinctive group.

Cross-section analysis must start with *Taylor v. Louisiana*, 419 U.S. 522 (1975). Explaining that the "purpose of a jury is to guard against the exercise of arbitrary power," the Court held:

This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. * * *

* Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

Id. at 530 (emphasis added).

Such distinctive groups or cognizable classes have been said to include "economic, social, religious, racial, political and geographical groups of the community." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946) (daily wage-earners cognizable class).³ Women comprise such a distinctive group. *Taylor*, 419 U.S. at 531; *see Duren*, 439 U.S. 357 (1979). Distinctions based on race or national origin clearly meet the *Taylor* standard. *See, e.g., Castaneda v. Partida*, 430 U.S. 482 (1977); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Smith v. Texas*, 311 U.S. 128 (1940). Somewhat more problematical are classifications based on age, education, and

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Thiel, in fact, represents a high-water mark for the Court's recognition of such possible cognizable classes. In recent years, the Supreme Court has looked primarily to race and sex to find distinctive groups. Further, since the civil suit in *Thiel* involved the Court's supervisory power over the administration of justice in the federal courts, 328 U.S. at 225, consideration of the principles of comity and the deference owed to a state's criminal justice system did not arise. Regardless of the weight to be given *Thiel*, even broadly interpreted it would not encompass attitudinal classes.

type of work. See, e.g., *Hamling v. United States*, 418 U.S. 87 (1974) (assumed young are cognizable group); *United States v. Potter*, 552 F.2d 901 (9th Cir. 1977) (less educated not cognizable class); *Quadra v. Superior Court*, 378 F. Supp. 605 (N.D. Cal. 1974) (blue-collar workers not cognizable).

The court today, however, enters uncharted waters when it recognizes attitudes or opinions as sufficient to create a distinctive group. Attitudes and opinions, unlike the characteristics that underlie recognized cross-sectional groups, may change rapidly, whimsically, and without objective manifestation.⁴ The extreme reach of the court's opinion is reflected by this statement:

If prospective jurors, who would take an oath to decide a case on the basis of the law and facts presented, could be excluded for cause because they were white or black, or, based on questions elicited on *voir dire*, because they were pro-ERA, pro-life, Republicans or Democrats, such a systematic exclusion from the panel, would encroach upon a party's sixth amendment right to have a cross-sectional jury.

4

Insofar as *Witherspoon* does afford authority for recognition of WEs as a distinctive group, we observe that Justice Stewart's opinion came to the conclusion that "in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community." 391 U.S. at 520. Justice Stewart observed that in 1966 47% of the American public were opposed to capital punishment, while 42% were in favor and 11% were undecided. *Id.* Time has caused a shift in these attitudes, however. See Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev., 1245, 1249 (1974). The public support for the death penalty was 51% in 1969 and 59% by 1973. *Id.* Figures in the November 1982 Gallup Report show 72% in favor of the penalty. Thus, there is a question concerning the validity of an assumption underlying the *Witherspoon* analysis.

Further, we also observe that there was evidence before the district court of the volatility and ephemeral nature of such attitudes. Dr. Gerald Shure testified that classifications can shift during a series of questions and some jurors can change their attitudes during the trial. The number of WEs has evidently varied from 23% of the population to 11-17% of the jury eligible population.

Supra at 7. The court could not make this statement unless it believed that the opinions and attitudes it itemizes are sufficient to create cognizable classes. However, while individuals may be classified according to their expressed attitudes, the constitutional issue is whether such classification is durable enough and objective enough to create a recognizable group. If a jury panel were questioned closely enough, a great many additional classes might emerge. It would be absurd, however, to suggest that the sixth amendment would prevent the exclusion for cause of each such class.⁵

The reasoning of the Supreme Court of California is most persuasive in this regard:

Persons who would not be willing to vote for the death penalty come from diverse backgrounds and experiences, and may have diverse views on all other matters. Their unwillingness to vote for death may come from many sources: religious conviction, political alignment, moral philosophy, refusal to take such an awesome responsibility, or simply a feeling that "I just couldn't live with it." They do not comprise a distinctive, self-conscious group; one's identity is defined in part by his or her gender, race, religion, and other matters, but not generally by one's views on the single question of whether one would vote against death if chosen as a juror in a capital case. We conclude that the class of persons united only by their determination to vote automatically against the death penalty—a class divided in all else, including even their reasons for refusing to consider the death penalty—is not a cognizable class * * *.

5

For example, in *McCree's* case, those who knew either the defendant or the victim, those who were victims of crime, and those who had relatives involved in police work were identified, and, since each such group had some predisposition toward the case that justified disqualification, were removed for cause. The logical conclusion from the court's action today is that such groups of jurors may in the future become the subjects of empirical studies as to their attitudes and subsequently be found to compose cognizable groups that cannot be so excluded for cause. The folly of such an outcome is obvious.

People v. Fields, 35 Cal. 3d 329, 349, 673 P.2d 680, 692, 197 Cal. Rptr. 803, 815 (1983), cert. denied, 105 S. Ct. 267 (1984).

The efforts of other circuits to define cognizability reveal similar concerns. In *United States v. Potter*, 552 F.2d 901, 904 (9th Cir. 1977), the Ninth Circuit held that cognizability requires "an identifiable group, which in some objectively discernible and significant way, is distinct from the rest of society, and whose interest cannot be adequately represented by other members of the * * * panel" and "some internal cohesion." *Potter* also looked to "whether a particular class is in fact thought of as an identifiable group by the community." *Id.* at 904-05. In *United States v. Test*, 550 F.2d 577, 591 (10th Cir. 1976), the Tenth Circuit defined cognizability as: "(1) the presence of some quality or attribute which 'defines and limits' the group; (2) a cohesiveness of 'attitudes or ideas or experience' which distinguishes the group from the general social milieu; and (3) a 'community of interest' which may not be represented by other segments of society." *Potter* and *Test*, unlike the court today, require a cohesive group recognized by and distinguished from society in general. A group of jurors who during voir dire examination in a criminal case express a particular attitude as to capital punishment does not meet this test. A distinctive group should have some recognition, some characteristic outside the narrow confines of the courtroom. Thus, as a matter of law I reject the conclusion that the presence of attitudes concerning the death penalty can create a cognizable class.

III.

McCree is not entitled to relief even if it is assumed that the majority is correct in holding that *Witherspoon* excludables are a cognizable group. Arkansas has significant interests that are "manifestly and primarily advanced" by its death-qualification process. *Duren*, 439 U.S. at 367-68.

Arkansas currently utilizes a bifurcated scheme, in which a single jury sits at the guilt and sentencing stages. Georgia's use of a similar system was approved by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 162-68 (1976). Jurors who refuse to consider imposing the death penalty are properly excluded from the sentencing phase. See *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Lockett v. Ohio*, 438 U.S. 586, 596 (1978). A representative jury does not include the "jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." *Id.* at 596-97. As the Supreme Court stated in *Adams*, states have a "legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." 448 U.S. at 44. Capital jurors must be willing to recognize "that in certain circumstances death is an acceptable penalty," and the "State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oath." *Id.* at 46, 50. It was exactly such jurors who were excluded from McCree's jury. Arkansas may constitutionally exclude from capital-sentencing juries those who will not consider the full range of punishments. That such exclusions will incidentally remove some venire persons from the guilt phase of the trial does not vitiate the state interest in death-qualifying juries for sentencing.

Thus, the issue narrows to whether the state has an interest in maintaining the single-jury bifurcated system. The Arkansas legislature and supreme court have approved the use of a single jury in capital cases. See *Rector v. State*, 280 Ark. 385, 393-98, 659 S.W.2d 168, 172-74 (1983), cert. denied, 104 S. Ct. 2370 (1984). The state has an interest in seeing that the same persons who decide guilt fix punishment. As the Arkansas Supreme Court has observed:

A jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape * * *. It has always been the law in Arkansas, except when punishment is mandatory, that the same jurors who have the responsibility for determin-

ing guilt or innocence must also shoulder the burden of fixing the punishment. That is as it should be, for the two questions are necessarily interwoven.

Rector, 280 Ark. at 395, 659 S.W.2d at 173. Placing the moral responsibility on the same group of jurors to decide both guilt and punishment is justified by the most significant policy considerations. When one jury hears both phases of the case, the jurors that comprise it cannot evade the heavy responsibility placed upon them of whether a convicted person should receive the death penalty. The court today would seem to require the replacement of some members of the guilt-phase jury with death-qualified jurors for the purpose of considering the death penalty. This division of responsibility between the two groups, even if only a few are replaced, would dilute accountability and disadvantage the accused.

Further, as several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or "whimsical" doubts, *Balkcom*, 578 F.2d at 496, about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases. To divide the responsibility, as the court's decision today would require, to some degree would eliminate the influence of such doubts.

Some courts have suggested that the state has an interest in assuring that *Witherspoon* excludables do not act as nullifiers in the guilt determination. See *Keeten*, 742 F.2d at 133; *Spinkellink*, 578 F.2d at 595; *Rector*, 280 Ark. at 397, 659 S.W.2d at 174; cf. *Adams v. Texas*, 448 U.S. at 46 (jurors must be willing to answer certain questions without "conscious distortion or bias" whose affirmative answers would

lead to imposition of death penalty by the court).⁶ This risk is acute here because Arkansas requires unanimous verdicts in capital cases. See *Grigsby v. Mabry*, 637 F.2d at 530 (Floyd R. Gibson, J., dissenting). Thus, the state's interests justify the removal of *Witherspoon* excludables from the guilt phase.

As the Supreme Court has made clear several times, it is "unwilling to say that there is any one right way for a State to set up its capital-sentencing scheme." *Spaziano v. Florida*, 104 S.Ct. at 3165; cf. *Gregg v. Georgia*, 428 U.S. at 186-87 (judgments concerning capital punishment schemes should be tempered with considerations of federalism and the states' ability to judge the desirability of the death penalty as a sanction). The state interests asserted are sufficient grounds to uphold the Arkansas capital punishment structure.

IV.

The court, stating that the question is "whether an impartial jury can exist when a distinct group in the community is excluded by systematically challenging them for cause," further characterizes the issue as whether an impartial jury can be present without a "jury drawn from the entire cross section of the community as a whole, including both those who strongly favor the death penalty and those who strongly oppose it." *Supra* at 31 (quoting *Grigsby*, 569 F. Supp. at 1311). It approves the statement of the district court in *Keeten* that "[a] fair jury has not been provided when the prosecutor is able to keep on the jury those persons most likely to convict and to exclude from the jury for cause all those persons most likely to acquit." 578 F. Supp. at 1167. The court thus apparently holds that impartiality

⁶

The Harris 1971 study discovered that 56% of *Witherspoon* excludables would not vote to convict a person that they believed guilty, even if they could also vote "no" in the sentencing stage to prevent imposition of the death penalty.

under the sixth amendment requires a balancing on the jury as a whole of the juror attitudes regarding the death penalty.

The court's first error in this analysis lies in assuming that partiality as a *legal* concept is proven when *factually* it can be shown that juries with WEs removed are more conviction-prone. Even if we assume that the latter proposition is correct,⁷ the court still fails "to bridge the gap of proof between the abstract proposition that death-qualified jurors are conviction prone and the contention that the jury which convicted him was in fact less than neutral with respect to guilt." *Balkcom*, 660 F.2d at 580 n. 17.

"That a death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant." * * *

* Although the new studies may give us an external, ascertainable standard for determining death-qualified jurors' tendency to convict, they do not give us a standard for measuring impartiality *per se*. Moreover, we

7

We will not enter into a detailed analysis of the various studies relied upon by the district court and the court today. It is enough to generally observe that an empirical study, no matter how carefully conducted, simply cannot duplicate accurately the proceedings in a courtroom under which a jury is selected and sworn to try the issues in a criminal case. The responsibilities placed on jurors in such circumstances are sobering and have a solemn impact upon them. In this situation, one's responsibility is felt keenly. "There is a certain danger in relying on academic work, designed to promote inquiry and further research, as a basis for deciding disputes in a court of law — especially where the stakes involved are high and the implications for society are great." Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170, 186 (1975); cf. Tanke & Tanke, *Getting Off a Slippery Slope*, 34 Am. Psychology 1130, 1138 (1979) ("Few persons, social scientists included, would be content to have fundamental constitutional liberties turn on the results of the latest experimental study.").

cannot expect to achieve the abstract concept of impartiality if it be equated with absence of tendency.

Id. at 578 (quoting *Spinkellink*, 578 F.2d at 594) & n. 13.

To understand legal impartiality we may look either to the individual jurors or to the jury as a whole. If we look to the former, it is obvious that all jurors undoubtedly come to their task with a number of attitudes, opinions, and "biases" that may bear on the way they will view the trial. The crucial question is whether such views prevent them from taking and following their oath to consider and decide the facts impartially and conscientiously apply the law as charged by the court. As was recently held in *Balkcom*:

[U]nalterable opposition to the death penalty is a legitimate disqualification and * * * the exclusion of such disqualified jurors does not violate the fair cross-section principle of the sixth amendment. The fair cross-section must, in the end, be fair. Neither the state nor the defendant is entitled to an unfair juror whose interests, biases or prejudices will determine his or her resolution of the issues regardless of the law and regardless of the facts. A cross-section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased.

660 F.2d at 583.

If we look to the jury as a whole, the court today may be urging that we view impartiality "as a middle ground that involves a jury with persons who are in effect defendant prone." *Id.* But if defendant-prone individuals are added to an impartial jury, then the scales of justice have been tilted in favor of the accused. Yet the state as well as the accused enjoys a right to an impartial jury. As *Balkcom* points out:

The guarantee of impartiality cannot mean that the state has a right to present its case to the jury *most*

likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury *most* likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury *least* likely to convict or impose the death penalty, nor that the defense must present its case to the jury *least* likely to find him innocent or vote for life imprisonment.

Id. at 579.

The only other interpretation of the court's position today is one that assumes that jurors come to their tasks with biases that cannot be overcome, that one can only attempt to balance such conflicting biases in seating a representative jury, and that removal of WEs, who are acquittal-prone, thus tilts the jury as a whole toward conviction. I am not prepared to say, however, that a juror who is not a WE must be regarded as so conviction-prone that his very presence on the jury creates impartiality unless counterbalanced. Ultimately, I believe this view of the jury strips of significance the sworn oath of impartiality that each juror takes. The comments of the late Judge Prettyman regarding this issue are entirely apposite:

[O]ur own inquiry has brought to our attention another thesis in this area of the law. It is that persons who are not opposed to capital punishment are psychologically inclined against criminals and therefore a jury composed of such persons is not an impartial jury. We understand that this thesis has not as yet received the sanction of any court. We cannot accept it. We examine it because this is a serious case, and if the thesis were tenable it might cause reversal. No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case. Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in

respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment. The two antipathies can readily coexist; contrariwise either can exist without the other; and, indeed, neither may exist in a person. It seems clear enough to us that a person or a group of persons may not be opposed to capital punishment and at the same time may have no particular bias against any one criminal or, indeed, against criminals as a class; people, it seems to us, may be completely without a controlling conviction one way or the other on either subject. We think the premise for the thesis has no substance.

Tuberville v. United States, 303 F.2d 411, 420-21 (D.C. Cir.), cert. denied, 370 U.S. 940 (1962), quoted in *Spinkellink*, 578 F.2d at 595.

In *Witherspoon* terms, although a death qualified jury may be more prone to convict than a jury with *Witherspoon* excludables, such a jury need not be "less than neutral." 391 U.S. at 520 n. 18. To date three different panels of circuit courts have unanimously concluded that as a matter of law *Witherspoon* exclusions do not fail to produce impartial juries. *Keeten*, 742 F.2d at 134; *Balkcom*, 660 F.2d at 578-79; *Spinkellink*, 578 F.2d at 593-96. The court today cites as precedent only the overruled district court opinion in *Keeten*. It starkly stands alone in its views as to partiality under the sixth amendment.

The court today declares that jurors who would refuse to follow the law in a capital case and consider the full range of penalties, including a sentence of death, are a distinctive group whose absence from a petit jury robs it of neutrality and impartiality. I cannot accept this conclusion. We should reverse the decision of the district court and order denial of the writ.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

SUPPLEMENTAL APPENDIX

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CLERK

IN THE
Supreme Court Of The United States

No. 84-1865
October Term, 1984

A. L. LOCKHART, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION *Petitioner*
V.

ARDIA V. McCREE *Respondent*

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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**Counsel of Record*

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SUPPLEMENTAL APPENDIX

JAMES T. GRIGSBY *Petitioner*

v.

JAMES MABRY, COMMISSIONER, ARKANSAS
DEPARTMENT OF CORRECTION *Respondent*DEWAYNE HULSEY *Petitioner*

v.

WILLIS SARGENT, SUPERINTENDENT OF THE
CUMMINS UNIT PENITENTIARY,
GRADY, ARKANSAS *Respondent*ARDIA McCREE *Petitioner*

v.

VERNON HOUSEWRIGHT, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION *Respondent*
Nos. PB-C-78-32, PB-C-81-2
and PB-C-80-429.United States District Court, E.D. Arkansas,
Pine Bluff Division.

Aug. 5, 1983

James T. Grigsby, pro se.

Ardia V. McCree, pro se.

Matthew T. Horan, Fayetteville, Ark., for
Dewayne Husley.Victra L. Fewell, Joseph H. Purvis, Asst. Attys.
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T. Seaver, Los Angeles, Cal., Reed E. Hundt, Michael
Chertoff, Washington, D.C., John Charles Boger, New
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petitioners.

MEMORANDUM OPINION

EISELE, Chief Judge.

Pending before the Court are the habeas corpus petitions of James T. Grigsby, Dewayne Hulseby and Ardia McCree, who have been in the custody of the Arkansas Department of Correction since their convictions for capital murder. Each petitioner contends that his conviction must be set aside due to the exclusion for cause at the guilt determination phase of his trial of certain venirepersons who during *voir dire* professed adamant scruples against the death penalty. The Court concludes that the process, as used in these cases, of "death qualification" of prospective petit jurors suffers from two serious constitutional defects: first, it denies the accused a trial by a jury representative of a cross-section of the community; and second, it creates juries that are conviction-prone. The

death-qualification process as practiced under Arkansas law, being unconstitutional, the writ must issue, but only in Mr. McCree's case for the reasons stated below.

I Background: Prior Proceedings and Facts.

All three petitioners were convicted of capital murder. Mr. Grigsby was so convicted in Franklin County, Arkansas, in September 1976. Mr. Hulsey was convicted in Ouachita County, Arkansas, in November 1975. Mr. McCree was convicted in Ouachita County, Arkansas, in 1978.

After Mr. Grigsby's conviction, the State waived the death-penalty, and he was sentenced to life in prison without parole. After Mr. Hulsey's conviction, a penalty trial was held in front of the same jury. Mr. Hulsey was sentenced to die. After Mr. McCree's conviction, he was sentenced to life in prison without parole.

This Court, in an earlier opinion, concluded that one of the prospective jurors in Mr. Hulsey's case was improperly excluded from the penalty phase of the trial because she did not unequivocally state that she could not impose the death sentence. This Court therefore ordered that the death sentence imposed upon Mr. Hulsey be vacated on the basis of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20, L.Ed.2d 776 (1968).

In Mr. Hulsey's trial, nine jurors were excused for cause because of their opposition to the death penalty. The State used all but four of its peremptory challenges in excluding other jurors. Mr. Hulsey's trial attorney made no objection to the exclusion for cause of death-scrupled veniremen. This Court therefore concluded, in an earlier opinion, that Mr. Hulsey could not raise the "Grigsby" issue on Federal habeas corpus review because of the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (contemporaneous objection rule bars consideration absent cause and prejudice). See also *Engle v. Issac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). *Hulsey v. Sargent*, 550 F.Supp. 179 (E.D.Ark. 1981). The remainder of Mr. Husley's claims in support of his habeas corpus petition have been set for hearing commencing on September 30, 1983.

In petitioner McCree's trial, eight prospective jurors were excused for cause from the guilt-innocence phase because they stated that they could not impose the death penalty. The State used three of its peremptory challenges in excluding other prospective jurors from the panel who had expressed less adamant opposition to the death penalty, i.e., person who could not be excluded for cause under *Witherspoon*. Mr. McCree's trial attorney made a timely objection to the exclusion of death-scrupled veniremen for cause. The remainder of Mr. McCree's arguments for the issuance of a writ of habeas corpus were considered and rejected by the Honorable Elsie T. Roy. *McCree v. Housewright*, No. PB-C-80-429 (E.D.Ark. Jan. 6, 1982). Judge Roy's decision was affirmed by the Eighth

Circuit Court of Appeals. *McCree v. Housewright*, 689 F.2d 797 (8th Cir.1982), *cert. denied sub. nom.*, *McCree v. Lockhart*, — U.S. —, 103 S.Ct. 1782, 76 L.Ed.2d 352 (1983).

The facts concerning the *voir dire* and challenges in the Grigsby capital murder trial are set forth in the earlier decision of this Court, *Grigsby v. Mabry*, 483 F.Supp. 1372 (E.D.Ark.1980). Based upon these facts, this Court on May 16, 1979, sent the *Grigsby* case back to the Franklin County Circuit Court so that Mr. Grigsby would have an opportunity to present evidence in support of his motion that potential jurors opposed to capital punishment not be excluded for cause during the guilt determination phase of his trial. It was further Ordered that the evidentiary hearing commence not later than May 31, 1980. *Id.* at 1391. Both parties appealed. By a two-to-one decision, the Eighth Circuit Court of appeals affirmed the trial court's decision to require an evidentiary hearing, but determined that the federal district court would be the appropriate forum therefor. In that connection Judge Lay stated:

This court has recognized the broad discretion of the district court to "send a case back to the state courts to resolve issues more properly considered by the Judge who experienced the trial first hand." *United States ex. rel. McQueen v. Wangelin*, 527 F.2d 579, 581 (8th Cir. 1975); *see also Hart v. Eyman*, 458 F.2d 334, 338-40 (9th Cir.), *cert. denied*, 407 U.S. 916 [92 S.Ct. 2441, 32 L.Ed.2d 691] (1972). The issues in this case, however, are not of the kind more properly considered by the

judge who experienced the trial first hand. *Cf. Jackson v. Denno*, 378 U.S. 368 [84 S.Ct. 1774, 12 L.Ed.2d 908] (1964); *Boles v. Stevenson*, 379 U.S. 43 [85 S.Ct. 174, 13 L.Ed.2d 109] (1964); *Patterson v. Lockhart*, 513 F.2d. 579, 581 (8th Cir.1975); *United States ex rel. Fisher v. Driber*, 546 F.2d 18, 22 (3d Cir.1976). The issues here are (1) whether prospective jurors were disqualified because of their death penalty views. (2) if they were, whether the resulting death-qualified jury was more prone to convict Grigsby or to convict him of a higher degree of murder, and (3) if it was, what legal remedy should be accorded Grigsby. There are no special circumstances or relevant cases which indicate that the trial court is a more appropriate forum than the district court for resolution of these issues.

Grigsby v. Mabry, 637 F.2d 525, 528-29 (8th Cir. 1980.)

The district court, after the original hearing, had "hesitantly" concluded that petitioner Grigsby would be denied relief based upon his contention that his constitutional right to a jury drawn from a fair, representative cross-section of the community was violated.¹ In a footnote to Judge Lay's majority opinion, it stated:

1. This Court granted relief to the petitioner on the ground that "the refusal of the [state] trial court to allow a continuance so that the petitioner could attempt to make the evidentiary showing suggested in *Witherspoon* of the guilt-proneness of 'death qualified' juries so seriously denigrated his constitutional right to an impartial jury that the denial amounted to an abuse of discretion." 483 F.Supp. at 1388.

We also vacate the district court's finding that the defendant was not denied a jury composed of a cross-section of the community. Because the record is to be supplemented by further evidence and in view of the close relationship of petitioner's claim on the cross-section issue to the guilt-proneness claim the district court should, upon completion of all the evidence, enter its findings on both claims. In this way there can be a single appeal on both issues regardless of the outcome in the district court on either issue.

Id. at 529 n.5.

As noted above this decision is made with respect to three different habeas petitions. James Grigsby, Dewayne Hulsey, and Ardia McCree filed separate habeas corpus petitions in which they challenge, among other things, the exclusion for cause by the State from the guilt determination phases of their capital murder trials of those prospective jurors who were adamantly opposed to the death penalty. The petitions were therefore consolidated for the determination of this issue only. An evidentiary hearing was held on July 13-17 and July 29-31, 1981, in this Court. The case was submitted much later after extensive briefing.²

2. At the time of the 1980 decision, Mr. Grigsby was in the custody of the Arkansas Department of Correction. On June 27, 1983, Mr. Grigsby died in his cell. All parties have agreed that the death-qualified jury claim of Mr. McCree remained pending for this Court's decision. On June 30, 1983, the Court notified the attorneys that it would proceed with a resolution of the issues on Mr. McCree's behalf. In addition, the Court notes that Mr. Hulsey and the State will benefit from a resolution of those issues, in the event that this Court's finding of a waiver is eventually reversed by a higher court.

As a result of the evidence introduced at the hearing scheduled after the remand of the case, and after further research, this Court has reconsidered its decision that petitioners not prevail on their claim that they were unconstitutionally denied a jury composed of a representative cross-section of the community. The Court now concludes, as stated above, that the petitioners must prevail, both on that contention and also upon their claim that juries death-qualified under the *Witherspoon* standard are more likely to convict than juries from which persons are not excused on the basis of their adamant feelings for or against the death penalty. An analysis of the substantive issues follows.

II. Denial of a Jury Drawn From a Fair, Representative Cross-Section of the Community

A. The History of This Issue in This Case:

After a long discussion of the development of the principle that there is a constitutional right to a jury drawn from a group which represents a fair cross-section of the community, this Court stated that:

[T]he exclusion on *Witherspoon* grounds or scrupled jurors from the guilt determination phase of a trial would seem to run afoul of the Sixth Amendment guarantees.

Grigsby 483 F.Supp. at 1384. However, the Court concluded that there were two "roadblocks" to this conclusion:

(1) *Witherspoon* itself, and (2) the argument that the two scrupled *Witherspoon* groups (that is, those adamantly opposed to the death penalty and those mildly opposed to the death penalty) are not "distinctive" one from the other and that, therefore, if you exclude only one of such groups, the presence of the other group on the jury panel will ensure that the jury is "representative." Cf. [*United States v.*] *Olson*, [473 F.2d 686 (8th Cir. 1973)], *supra*.

* * * * *

This Court is, of course, aware that the group barred in *Witherspoon* was larger than the group barred in this case. However, in view of cases decided subsequent to *Witherspoon* by the Supreme Court, it is not at all clear that the question concerning representation in the guilt determination phase of the trial would be answered the same way it appears to have been answered by the *Witherspoon* decision. See *supra*, p. 1380. But *Witherspoon* has not been specifically overruled, and this Court, hesitantly, concludes that it must follow that precedent. This conclusion is reinforced by the Court's belief that the Eighth Circuit and the Supreme Court might uphold *Witherspoon*, as here applied, even after, and in the face of *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)], on the theory that no "distinctive" group has been excluded and that the State's interest in having one jury determine guilt and sentence would justify the removal of those

adamantly opposed to capital punishment by for-cause challenges.

Grigsby at 1384-85. The Eighth Circuit case of *United States v. Olson*, 473 F.2d 686 (8th Cir.1973), set forth the rationale of the principal "roadblock." In that case it was alleged that an identifiable community group, to wit, persons aged 18 to 20, were excluded, and that the effect of this was to deny the petitioner there his Sixth Amendment right to a representative jury. Judge Matthes stated:

Accordingly, the dispositive question is whether persons aged eighteen to twenty compose an "identifiable group" which cannot be systematically excluded from jury service without rendering juries nonrepresentative of community attitudes. But appellant has "failed to show that the attitudes of this group [18-20] are inadequately represented by those several years older than they, that is, that eighteen to twenty-one years olds are a distinct, cognizable group." *United States v. Deardorff*, 343 F.Supp. 1033, 1043 (S.D. N.Y. 1971). "The difference in viewpoint between ages [eighteen to twenty and twenty-one to twenty-five, for example] . . . would not seem to us of any great significance . . . *King v. United States*, 346 F.2d 123, 124 (1st Cir.1965). Accordingly, we hold that persons aged eighteen to twenty are not an identifiable group the exclusion of which renders a jury list nonrepresentative of the community and violative of the Fifth and Sixth Amendments.

Olson, 473 F.2d at 688 (emphasis added). It appears from the opinion that there was no evidence or empirical data from which the Court could determine whether the "decisional outlook" of persons between ages 18 to 20 differed from that of the 21 to 25 age group in any significant manner. The Court stated that it regarded it "as highly speculative whether the decisional outlook of such excluded persons would be different from that of persons a mere few years older." *Id.* (quoting *King v. United States*, 346 F.2d 123, 124 (1st Cir. 1965)). So in the *Olson* case the Eighth Circuit was confronted with a record from which it could not determine if the 18 to 20 year old group was a "distinctive, identifiable group."

This Court questions whether, as a general rule, a group, to qualify as a substantial, distinctive and identifiable class, must necessarily hold a "distinctive attitude" unrepresented by others on the jury. The theory of the representation cases is generally to the contrary. One has only to consider that contention in connection with the exclusion of women or blacks. The vice lies not in the assumption of the truth of the proposition that blacks or women hold distinct attitudes unrepresented by white males—although they might³—but in the removal of *any* significant qualified group from the panel without some good cause. And, conceptually, no showing is required to establish that the removal of such a large "distinctive" group would result in a jury more guilt-prone or more

3. The evidence in this case demonstrated that statistically they do hold different attitudes toward the death penalty from those possessed by white males. See *infra*.

likely to convict because we are dealing here with what under the Sixth Amendment, is properly considered a "jury"—not the same question as what, under the Sixth Amendment, is an "impartial jury." However, when a particular group is *defined by its distinctive attitudes*, as here, it is obviously necessary for the proponent to establish the existence of a group whose "decisional outlook" is different from that of non-excluded people. By the same token it is open to the opponent to attempt to show the contrary. Whether *Olson* might be wrong on the above analysis is beside the point. Here we must deal with "distinctive attitudes" and "decisional outlook" because such criteria are needed to define the group at issue.

Before dealing with the specific "cross-section, representative" jury issue presented in this case, it will be useful to review the history of the development of that concept.

B. *The Pre-Duncan Development of the Cross-Section Principle:*

The right to a fair cross-sectional, representative, jury has been based upon the due process and equal protection clauses of the Fourteenth Amendment and also upon the Sixth Amendment. The Sixth Amendment did not become applicable to state criminal prosecutions until *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Therefore, prior to 1968, the focus was upon the due process and equal protection clauses of the Fourteenth Amendment. The earliest cases dealt with the exclusion of blacks from

jury service. In *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), a West Virginia statute which permitted only white males above the age of 21 to serve as jurors was challenged by a black defendant. The Supreme Court ruled that under the Fourteenth Amendment, "... the Statute ... amounts to a denial of the equal protection of the laws to a colored man" *Id.* at 310. Although the main thrust of the *Strauder* opinion is to vindicate the purpose of the Fourteenth Amendment to assure to blacks the enjoyment of all the civil rights that are enjoyed by white persons, the language of the opinion contained implications that went beyond that narrow thrust. The court indicated that the exclusion of an entire class of people would violate the equal protection clause even if those excluded were white men or "naturalized Celtic Irishmen." *Id.* at 308. The Court said:

The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds"

Id. In *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), the Supreme Court in a unanimous decision extended this doctrine to strike down the systematic exclusion of Mexican-Americans from jury service.

As indicated above, prior to *Duncan*, the Supreme Court had no occasion to consider the importance of the

Sixth Amendment in connection with state criminal trials since the jury trial requirement of the Sixth Amendment was deemed inapplicable to the state courts.⁴

The idea that juries should be reflective of our democratic form of government was advanced in the cases of *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946), and *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946). In *Thiel* the Court invalidated a jury selection system under which daily wage earners were systematically excluded from the venire. The Court said, "American tradition of trial by jury . . . contemplates an impartial jury drawn from a cross-section of the community." 328 U.S. at 220, 66 S.Ct. at 985. In *Ballard*, the Court reversed a conviction and dismissed an indictment because women had been systematically excluded from jury service. In *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940), the Court stated, "it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community" In *Pierre v. Louisiana*, 306 U.S. 354, 358, 59 S.Ct. 536, 538, 83 L.Ed. 757 (1959), the Court said, "[T]rial by jury cease(s) to harmonize with our traditional concepts of

4. Federal trial courts have always been required to try criminal cases by jury, both because of the requirement of article III, section 2, of the United States Constitution and because of the requirements of the Sixth Amendment. In overseeing jury trials in federal courts, the Supreme Court could rely either upon its interpretation of the Constitution or upon the exercise of its supervisory power over proceedings in inferior courts.

justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service.”

It must be remembered that, although the *Witherspoon* case was decided by the Supreme Court two weeks after its decision in the *Duncan* case, the *Witherspoon* trial had occurred years earlier. Indeed, the *Witherspoon* majority opinion does not mention *Duncan* and does not rest upon the Sixth Amendment grounds. In *Witherspoon* the Court held that the exclusion of death-scrupled persons to an extent unnecessary to obtain jurors who could obey their oath to decide impartially the issues submitted to them violated a capital defendant's right to due process in the determination of penalty. The Court stated, “The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law.” 391 U.S. at 523, 88 S.Ct. at 1778.

Although *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), was decided after *Duncan*, the trial in *Peters* had occurred prior to *Duncan*. Therefore, the *Peters* decision was based upon the due process requirements of the Fourteenth Amendment. In *Peters*, Justice Marshall, in a plurality opinion, held that the systematic exclusion of blacks constituted a denial of the due process rights of any defendant, black or white:

When any large and identifiable segment of the community is excluded from jury service, the

effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable

* * * * *

It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. * * * In light of the great potential for harm latent in the unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

Peters v. Kiff, 407 U.S. at 503-04, 92 S.Ct. at 2168-69 (footnote omitted).

Finally, when the Supreme Court in *Duncan* first extended the protection of the Sixth Amendment to defendants in state criminal cases it reasoned:

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge The deep commitment of the Nation to the right of jury trial in

serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

391 U.S. 145, 155-56, 88 S.Ct. 1444, 1450-51, 20 L.Ed.2d 491 (1968).

C. Post-Duncan Development:

After *Duncan*, the Supreme Court had several occasions to deal directly with the Sixth Amendment requirements. It concluded that a "representative jury" was necessary, *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1983, 26 L.Ed.2d 446 (1970), and that a criminal trial jury should consist "of a group of laymen representative of a cross-section of the community." Finally, in *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), representativeness became the central consideration:

We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation

Id. at 530, 95 S.Ct. at 697. On that predicate it declared that the exclusion of women was unconstitutional, stating:

. . . Jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community

and thereby fail to be reasonably representative thereof.

Id. at 538, 95 S.Ct. at 701

D. Analysis:

Courts have generally refused to deal with the question of representativeness or "fair cross-section" in the abstract. In *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), the Supreme Court placed the burden upon the party challenging the jury selection process to disprove its representativeness; that is, to show that the jury panel fails in some significant way to reflect the community. And it must show that this result occurred because the group was systematically excluded by the selection procedure under attack. The court stated:

In order to establish a *prima facie* violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364, 99 S.Ct. at 668.

(1) What is a "distinctive group that may not systematically be excluded? First, it must be noted that if the exclusion of just any group were fatal, no practical jury system could survive. As a practical matter, one must first inquire whether the characteristic that defines the group is of any consequence to the proper functioning of the jury. For instance, some juries have been selected from lists composed of persons whose last names began with certain letters of the alphabet. Or a jury might be drawn from persons whose birthdays fall in odd or even months. Clearly, such systems would have the effect of excluding large numbers of people, but would those excluded be considered a "distinctive group" and would their exclusion be of any real consequence in terms of jury function?

It should be noted from these examples that the identifying criteria used automatically prevents the group excluded from having any "distinctive" characteristics different from the group remaining. In fact, it is assumed in these cases that the method of exclusion is randomly based and, therefore, that both the group excluded and the group remaining would continue to be "representative cross-sections of the community." Put another way, the method used prevents the removal of any "identifiably distinctive" group. In this connection it should be emphasized that such methods do not, directly or indirectly, have the effect of diminishing the representation on the panel of any "distinctive" group such as blacks or females. This is important here because, as will be noted below, the removal of

"*Witherspoon* excludables" does have the indirect effect of lessening the representation of certain groups such as the poor, women, blacks, and certain ethnic and religious groups. See *Grigsby*, 483 F.Supp. at 1384.

(2) Once a cognizable, distinctive group has been identified, the party making the challenge must show that this group is somehow systematically excluded. This exclusion need not be purposeful. It can result from either *de jure* exclusion by statute (e.g., *Strauder*), *de facto* exclusion by local practice (e.g., *Thiel*), or disproportionate exclusion resulting from the availability of exemptions (e.g., *Duren*). Here, the exclusion results from the *voir dire* process permitted. This particular process of exclusion has not been involved in prior cases. This is understandable when one realizes that death qualification is the only procedure in our criminal justice system which has the effect of systematically excluding an entire group of fair and impartial jurors because of a particular attitude that they possess upon a matter that is irrelevant to their services as jurors in the trial of the issue of the guilt or innocence of the accused.

(3) Once the challenging party establishes a prima facie case under *Duren*, the state must justify the procedure used. As stated in *Duren* the state must show that "a significant state interest . . . [is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group." 439 U.S. at 367-68, 99 S.Ct. at 670-71. And, as previously

pointed out, once a violation of the fair cross-section requirement has been established, prejudice to the defendant is presumed. See *Peters v. Kiff*, 407 U.S. at 503-05, 92 S.Ct. at 2168-70.

So this discussion brings us back to where we left off in this Court's first opinion in *Grigsby*. Do the "Witherspoon-excludables" constitute a "cognizable group," the systematic exclusion of which during the guilt determination phase would constitute a violation of the Sixth and Fourteenth Amendments?

Since *Duncan*, the Sixth Amendment focus has been upon the interposition between the accused and his accuser of the common sense judgment of a jury chosen from a group which truly represents the full range of community attitudes and perspectives that are relevant to the jury functioning process.

The empirical approach to the problem of ascertaining the existence of cognizable groups can be seen developing in the cases. In dealing with groups other than racial minorities and women, the Supreme Court has hesitated to assume any automatic correlation between demographic characteristics and relevant jury-functioning attitudes. This explains the age group cases, such as *United States v. Olson*, i.e., in the absence of empirical data showing that young people between the ages of 18 and 20 possess distinctive attitudes relevant to the jury functioning process from those attitudes held by other young persons between the ages of 21 and 25, the Court was unwilling to assume that the exclusion of the 18-to-20 year old

group would destroy the representativeness of the jury. Or, put another way, the Court was unwilling to assume that the 18-to-20 year old group was a "distinctive" cognizable group in relation to pertinent jury functions. Likewise, courts have refused to assume that pertinent juror attitudes might be determined by place of residence. See *United States v. Butera*, 420 F.2d 564 (1st Cir.1979). And some courts have followed the same approach in dealing with the exclusion of economic groups.

The case at hand is *sui generis*; persons otherwise qualified are being removed because of a shared attitudinal perspective, and it is clear that the shared attitude is distinctive, i.e., it is not held by those who are not so excluded. As stated in this Court's first opinion:

It cannot be doubted that . . . those excluded for cause pursuant to *Witherspoon* constitute an identifiable group. No one else will represent their strong viewpoint on the jury in their absence. Indeed, the United States Supreme Court itself has drawn the line to create the two, assumedly different, groups: those with mild scruples who may not be excused for cause and those who will never impose the death penalty who may be so excused. And the Supreme Court's analysis clearly suggests that the difference is not merely quantitative. The first group simply does not represent the absolutist attitude of the more strongly scrupled group.

Grigsby v. Mabry, 483 F.Supp. at 1382.

But is this shared attitudinal perspective with respect to penalty significant at the guilt determination phase? Empirical data might show, for instance, that the 18-to-20 age group has a separate and distinct view with respect to a certain style of music or dress from the 21-to-25 age group. But would such distinction alone serve to make the 18-to-20 year old group "cognizable" for jury functioning purposes? Probably not. But it turns out that death penalty attitudes are at the opposite extreme. Those views are intimately tied to other attitudes and views which are directly implicated when jurors determine the guilt or innocence of a defendant in a criminal trial.

The evidence shows that "*Witherspoon* excludables" generally share an amalgam of interrelated attitudes toward the criminal justice system which is distinct from that possessed by "death qualified" jurors. Indeed, the evidence has now demonstrated that such attitudes of the "*Witherspoon* excludables" are different and distinctive even as compared to those mildly scrupled persons, i.e., those who have some negative attitudes towards the death penalty, but nevertheless could impose it in some cases. Such evidence undercuts the idea that the mildly scrupled jurors who are not excluded under *Witherspoon* would adequately represent the attitudes of those who are excluded under *Witherspoon*. See discussion of studies, *infra*.

Furthermore, the evidence establishes that one consistent and inevitable result of the death-qualification process is the disproportionate exclusion of blacks

and women. See discussion of studies, *infra*. This particular finding might indeed make it redundant to note, as the Court has above, that the evidence shows that the mildly scrupled jurors do not adequately represent the perceptions and perspectives of the "*Witherspoon* excludables." In other words, since the death qualification process clearly impacts more heavily upon blacks and women, it can be argued that no further showing is necessary.

As Judge Lay pointed out in the Eighth Circuit's decision, the issues concerning representativeness and guilt-proneness, although different, are closely inter-related in this case. For convenience, the empirical studies relating to *both* of such issues will be discussed under "guilt proneness," in Section II below.

[4] Prospective jurors who subjectively honestly believe, and swear, that they can fairly and impartially try the issues of fact relating to the guilt-innocence of the defendant should be permitted to serve even though we know that some prospective jurors are more likely to convict than others. The U.S. Supreme Court implicitly recognized this basic concept in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). It will be recalled that, under the "nullifier" prong of *Witherspoon*, the state could exclude persons whose death penalty views would prevent them from being impartial on the question of the defendant's guilt. In *Adams*, however, the Court refused to permit disqualification for the unwillingness or inability of a prospective juror to swear, in accordance with a Texas statute, that the possibility that the defendant might

be executed would not affect that person's deliberations on any issue of fact. Why? Because the Court felt this would be permitting exclusion of capital punishment objectors on a "broader basis" than that permitted by *Witherspoon*. The court has apparently recognized that death penalty ideas (and perhaps other ideas) may unconsciously affect how a person views and interprets evidence, how he understands the ideas of "presumption of innocence" or of "proof beyond a reasonable doubt," or the evidence relating to certain defenses. Yet that person may, in courtroom parlance, be a perfectly "good" juror—"good for the State" and "good for the defense"—because he honestly can, and honestly believes he can, try the issue of the defendant's guilt-innocence solely upon the basis of the law and the evidence. The language of the Supreme Court in the *Adams* case is instructive:

Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected." But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the

death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

448 U.S. at 49-50, 100 S.Ct. at 2528-29 (footnotes omitted).

So it is recognized that each of us is the product of our genes and experience. Each of us views things from different perspectives. We simply see things differently. No jury system can survive which permits exclusion upon the basis of a showing of just any unconscious predilection which might tend to favor the defendant or the state. Once again we must start with the democratic premises of the *inclusion* of those who can honestly swear that they can, and will, try the case upon the basis of the law and the evidence.

[5] Although, as pointed out in *Thiel*, there can be no certainty that the broad spectrum of community views on economic, social, religious, racial, or political issues will be present on any particular jury, we can be certain that prospective jurors, "be selected by court officials *without systematic and intentional exclusion of any of these groups*." 328 U.S. at 220, 66 S.Ct. at 985 (Emphasis supplied). Inclusion, not exclusion, must be the basic rule. Professor Winick makes the point this way:

To subject jury challenges to scrutiny under the sixth amendment, however, is not to say that the absence or substantial underrepresentation of any particular group on a petit jury violates the cross-section requirement. A defendant is not entitled to "A jury of any particular composition," or to a jury that mirrors the community. The random application of unobjectionable jury selection methods, or the legitimate exercise of challenges for cause or peremptory challenges, will often result in particular juries that do not even approximately mirror the community. Indeed, a jury of twelve could never reflect all the distinctive groups in the population. A defendant is entitled only to jury selection procedures which do not "systematically exclude distinctive groups in the community."

Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An empirical Study And A Constitutional Analysis*, 81 Mich.L.Rev. 1, 65-66 (1982) (footnote omitted) [hereinafter cited as *Peremptory Challenges in Capital Cases*].

The Court readopts what it stated in its first "*Grigsby*" opinion concerning the size of the excluded group, adding only that the evidence presented at the hearing after remand reinforces the conclusion that the group is of substantial size both nationally and within the state of Arkansas, ranging between 11% and 17% of those eligible for jury service. So the group excluded is both distinctive and sizeable.

[6] To meet the second element of the *Duren* test for establishing a prima facie violation of the fair cross-section requirement, the petitioners must show that the representativeness of the group "in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community." See 439 U.S. at 364, 99 S.Ct. at 668. The Court finds that the petitioners have made the requisite showing. However, before moving on the Court will deal with one of the arguments of the respondent on this point.

The respondent suggests that the Sixth Amendment cross-section requirement should apply only to the pool or venires and not to actual juries. And the Fifth Circuit has recently made a similar suggestion. *Smith v. Balkcom*, 660 F.2d 573, 583 n. 26 (5th Cir.1981). Such a contention flies in the face of the policies underlying the cross-section requirement and, if accepted, would provide a device for avoiding the effect thereof. Professor Winick's remarks in *Peremptory Challenges in Capital Cases*, *supra*, are again on target:

The concept of the jury as representing a fair cross-section of the community serves not only the interest of the litigants in a fair trial, i.e., the assurance of at least some degree of what Mr. Justice Frankfurter called "diffused impartiality," but significant societal goals as well. Community participation in the jury system comports with "our basic concepts of a democratic society and a representative government." Moreover, it is also "critical to public confidence in the fairness of the criminal justice system." These goals would not be accomplished if the representativeness requirement pertained only to jury pools, and if challenges systematically should be used in such a way that the juries actually selected are "made up of only special segments of the populace or if large, distinctive groups are excluded." Moreover, the essential purpose of the jury—to interpose the common sense judgment of the community as a hedge against the over-zealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge—is not achieved if the over-zealous prosecutor or over-conditioned judge can eliminate the representative character of the jury through the jury challenge process.

The systematic use of jury challenges should thus be subject to scrutiny under the sixth amendment cross-section requirement.

81 Mich.L.Rev. at 64. Professor Winick goes on to point out that we do not need to rely on the inconsistency of the contention with the underlying constitutional policies at issue. Rather we can directly

cite the U.S. Supreme Court in *Ballew v. Georgia*, 435 U.S. 223, 98, S.Ct. 1029, 55L.Ed.2d 234 (1978)—an extremely important case in so many ways—as clear precedent against the state's contention. In *Ballew*, the effort was made to uphold a five-person jury in misdemeanor cases against an attack under the Sixth Amendment cross-section requirement. The Court invalidated the five-person jury because, *inter alia*, that size "prevents juries from truly representing their communities . . ." *Id.* at 239, 98, S.Ct. at 1038. As Professor Winick observes:

No issue was raised concerning the representativeness of the jury pools from which Georgia selected five-person juries, or concerning the arbitrary exclusion of any particular class from five-person juries. Yet the Court noted that the absence of an equal protection problem did not dispose of "the question of representation," which combined with other factors created "a problem of constitutional significance under the Sixth and Fourteenth Amendments." If the cross-section requirement places limits on statutory reductions in jury size because resulting juries may not truly represent the community, then it should also be deemed to place limits on jury challenges which interfere with the representative character of resulting juries.

81 Mich.L.Rev. at 65 (footnote omitted). And of course, no one argues that it would be permissible under the Sixth Amendment to remove women or blacks by challenges for cause based solely on race or sex even though the pools or venires from which they

were drawn were perfectly representative of the community. And, although *Witherspoon* was not overtly a "Sixth Amendment" case, there is language therein with respect to the necessity of *including* mildly scrupled jurors in order to make the jury representative at the penalty phase of the trial. And, obviously *all* scrupled jurors were represented properly in the pool of venires. So the vice there as here was the destruction of representativeness through the challenge-for-cause process.

So the petitioners have met the second test required by *Duren*: the representation of the excluded group after *voir dire* and the consequent challenges for cause, will not be fair and reasonable in relation to the number of such persons in the community. In fact, *no* representative of such group will remain after *voir dire*.

And it is apparent to all that this under-representation (zero representation) is "due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364, 99, S.Ct. at 668. So petitioners have established their *prima facie* case. The only remaining question is: has the state justified its insistence upon the use of the challenged procedure? The Court will turn to this question after dealing with the "guilt-proneness" issue.

However, before putting the "representative cross-section" issue behind us the Court will look at a "*Witherspoon*" argument that keeps cropping up despite the obviousness of the answer thereto. The argument is that the Supreme Court will never accept

the petitioners' cross-section Sixth amendment contentions because of the position it took in *Witherspoon* itself. There the Supreme Court clearly permitted the removal *at the penalty phase* of the very group whose removal at the guilt-innocence phase of their trials, petitioners now contend destroys the cross-section or representativeness of the jury in violation of their constitutional rights. The argument goes: If petitioners have a constitutional right to a representative jury at the guilt-innocence phase of their trial they also have a right to such a jury at the penalty phase. The Supreme Court recognized that those with adamant views against the death penalty may be removed at the penalty phase. Since the Supreme Court obviously would not countenance an "unrepresentative" jury at the important penalty phase of the trial, it follows that it concluded in *Witherspoon* that a jury without those adamantly opposed to the death penalty would still be a "representative" jury under Sixth Amendment standards. Ergo, the logic runs, such a jury would also be representative at the guilt-innocence phase.

It is not an adequate answer to simply state that *Witherspoon* was not a Sixth Amendment case. But there are two separate analyses that put such an argument to rest. First, the *Witherspoon* qualified jury at the penalty phase, considering its mission, is as representative as can be: It is composed of all those, but only those, who can honestly swear that they are able and willing to try the penalty issue in accordance with the law of the state and the evidence presented. If a prospective juror states "I don't care what the law or the evidence is, I will never vote for the penalty of

death," i.e., if he is a Witherspoon Excludable, or if a prospective juror states, "I don't care what the law or the evidence might be, I will always vote to impose the death penalty for this type of crime," i.e., if he holds Automatic Death Penalty views, then neither will be able to conscientiously take the oath to serve as a juror who will be both fair to the defendant and fair to the state at the penalty phase. Both are therefore "nullifiers" in this context and are being excluded for the most traditional and accepted of all reasons: They cannot swear to try the issues presented upon the law and the evidence. They are not being removed because they are members of a group or class. The "bigamy-Mormon" example cited in the first *Grigsby* opinion comes to mind. If the Court states that it is its understanding that all Mormons believe that bigamy should not be considered a crime and, on that basis proceeds to exclude all who state they are Mormons, it would be committing error by excluding a religious class without justification. But if the Court asked each juror if he could try the charge of bigamy in accordance with the law and the evidence and all of the Mormons on the panel answered, "no," they could be properly excluded. But they would then be being excluded on the basis of their individual answers, not their group affiliation. Of course there might be one, more, or many Mormons who could honestly swear to put personal or religious values aside and to try the case on the law and the evidence. If so they should not be excluded. The *Witherspoon* death qualification rationale has implicit parallel considerations: not all prospective jurors who have scruples against the death penalty may be excluded at the penalty phase. Indeed,

only those may be excluded who could never impose the death penalty, regardless of the evidence and the law, i.e., only those who could not conscientiously swear to try the penalty issue with a mind that is not already closed on that issue.

[7] A second answer to such an argument would focus on the state's interest. The state has a strong and legitimate interest in having those penalty alternatives which have been established by its legislature considered by a jury that is capable of applying that law in a fair and impartial manner. This state interest can only be accommodated by permitting the removal for cause at the penalty phase of those who admit that they cannot try the penalty issues upon the law and the evidence. As stated in *Pierre v. Louisiana*, 306 U.S. 354, 358, 59 S.Ct. 536, 538, 83 L.Ed. 757 (1959):

[T]rial by jury cease(s) to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community are excluded as such from jury service.

(Emphasis supplied.)

III. *Denial of a Fair and Impartial Jury: Guilt Prone-ness of Death Qualified Juries.*

A. *Legal Principles and Terminology.*

[8] No proposition is more fundamentally linked to our accepted notions of due process than that which declares that persons charged with serious crimes are entitled, as a matter of right, to trial by a fair and

impartial jury. The litany which gives expression to that right is repeated in hundreds of jury cases daily throughout the nation. Indeed, the paramount objective of the entire *voir dire* process is to obtain a jury which will fairly and impartially try the issues of fact presented by the allegation in the indictment or information and the "Not Guilty" plea of the accused. This right arises from both the Sixth Amendment and the principles of due process. *Ristaino v. Ross*, 424 U.S. 589, 595 n. 6, 96 S.Ct. 1017, 1020 n. 6, 47 L.Ed.2d 258 (1976). To paraphrase *Witherspoon*, the decision whether a person is guilty or not guilty of a capital crime must be made on scales that are not tipped by state procedures toward guilt. See 391 U.S. at 521-22 n. 20, 88 S.Ct. at 1776 n. 20.

[9] Any procedure which might predispose the trier of fact to convict violates due process. This principle was firmly established in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), which involved challenge to an Ohio statute, that empowered a village mayor to act as Judge in trials of offenses against the state's prohibition laws, and that also entitled the mayor to recover \$12 in costs if a defendant was convicted. The Court held the statute unconstitutional under the due process clause of the Fourteenth Amendment, even without a showing of actual prejudice. The court stated:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the

balance nice, clear and true between the state and the accused denies the latter due process of law.

Id. at 532, 47 S.Ct. at 444.

The court made it clear that even though the evidence showed that the defendant was clearly guilty, he was entitled to have an impartial trier of fact:

No matter what the evidence was against him, he had the right to have an impartial judge.

Id. at 535, 47 S.Ct. at 445. See also *Connally v. Georgia*, 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977); *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972).

The cases involving pretrial publicity are also pertinent since, in such cases, it is necessary to determine if information received preceding the actual presentation of evidence might impair the trier of fact's ability to assess that evidence in a fair and objective manner. In *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966), the Supreme Court stated:

[T]he trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.

The objective is to prevent even the possibility of unfairness.

The majority in the Eighth Circuit *Grigsby* opinion directs this Court to resolve this issue: whether death-qualified jurors are more likely to convict than jurors selected without regard to their views on the death penalty. So the focus of our inquiry is upon the predisposition, if any, of death-qualified jurors. The Court now reviews the evidence bearing on this issue.

To deal with the pertinent empirical data it is necessary to settle upon some terminology, although neither legal scholars nor social scientists are fully in agreement thereon. The Court is here concerned with a spectrum of penalty preferences based upon differing attitudes toward the death penalty. Dr. Robert M. Berry in his article, *Death-Qualification and the "Fireside Induction,"* 5 U.Ark. Little Rock L.J. 1, 2 (1982) [hereinafter cited as "*Fireside Induction*"] has adapted the following useful table from the materials reported in *Hovey v. Superior Court*, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal.Rptr. 128 (1980):

Penalty Preference Toward Guilty Defendants
for Different Death-Penalty Attitudes

Attitude Toward Death Penalty				
Automatic death penalty group	Favor death penalty group	Indifferent group	Oppose death penalty group	Automatic life- imprisonment group

Attitude Toward Death Penalty

will always vote for death penalty instead of life imprison- ment	favours death penalty but will not vote to im- pose it in every case	neither favours nor op- poses the death penalty	opposes or has doubts about death penalty but will not vote against it in every case	will always vote for life impris- onment instead of death penalty
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Prior to *Witherspoon* many states permitted the prosecution to remove "for cause" during the *voir dire* of capital cases all persons who opposed the death penalty in any degree.⁵ See, e.g., *Williams v. State*, 32 Miss. 389, 392 (1856). This practice of "death qualifying" juries continued even when the guilt and penalty phases of capital trials were functionally separated. In the guilt phase the jury would determine the defendant's guilt or innocence. If it found the defendant guilty of the capital offense, the same jury would then decide whether to impose death or some other permissible penalty—usually life imprisonment. See "*Fireside Induction*," *supra* at 3.

In *Witherspoon* the Supreme Court determined that it was "self-evident" that juries formed by excluding all those who had "general objections to the death penalty" could not "speak for the community"

5. Arkansas practice was otherwise, however. See discussion of Arkansas law below.

and "were uncommonly willing to condemn a man to die." 391 U.S. at 518, 520, 521, 88 S.Ct. at 1775, 1776. The Court stated that only those "... who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt," *id.* at 522-23 n. 21, 88 S.Ct. at 1777 n. 21, could be excluded for cause. Of course there was nothing new in the second proposition since anyone, even in non-capital cases, will be excused for cause if, for any reason, he cannot swear that he will make an impartial decision on the guilt or innocence of the defendant. See discussion of "nullifiers" below. As a result of *Witherspoon* both those who are able to make an impartial decision on the defendant's guilt and those who are not are excluded from participating in that decision if they, on *voir dire*, express adamant opposition to the death penalty, i.e., if they would, at any later sentencing phase, "automatically" vote against the death penalty without regard to evidence in the case. Jurors possessing such strong scruples against the death penalty are referred to as "*Witherspoon* Excludables" or "WEs." In terms of the above table they could also be referred to as the "Automatic Life Imprisonment Group."

In *Witherspoon* it was also argued that to exclude jurors with scruples against the death penalty (groups 4 and 5 above) in the guilt-determination phase, as was done in that case, would result in creating a "tribunal

organized to return a verdict of death" thereby depriving the defendant of a representative jury as well as of an impartial jury. 391 U.S. at 521, 88 S.Ct. at 1776 (citing *Fay v. New York*, 332 U.S. 261, 294, 67 S.Ct. 1613, 1630, 91 L.Ed. 2043 (1947)).

The petitioner in *Witherspoon* attempted to persuade the Supreme Court on the basis of logic and intuition that those persons who expressed attitudes in favor of the death penalty would, as jurors, "favor the prosecution in the determination of guilt." He argued that " 'no additional proof' beyond 'the facts . . . disclosed by the transcript of the *voir dire* examination' " was needed to establish the unconstitutionality of a guilt determination by a death-qualified jury. See 391 U.S. at 517 n. 11, 88 S.Ct. at 1774 n. 11. In fact, the petitioner in *Witherspoon* expressly declined the "opportunity to submit evidence" on the guilt-proneness issue. It is true that at the appellate level the petitioner asked the Supreme Court to judicially notice summaries of some early social scientific research. More particularly, the Supreme Court was referred to: (1) W.C. Wilson, *Belief in Capital Punishment and Jury Performance* (1964) (unpublished manuscript, University of Texas) (2) F.J. Goldberg, *Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Cases* (undated) (unpublished manuscript, Morehouse College) and (3) H. Zeisel, *Some Insights into the Operation of Criminal Juries* [Nov. 1957] (confidential first draft, University of Chicago), 391 U.S. at 517 n. 10, 88 S.Ct. at 1774 n. 10. The Supreme Court found this data "too tentative and fragmentary

to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." *Id.* Indeed, those data were very "tentative and fragmentary." The Supreme Court noted that in his brief, Witherspoon relied only upon the Wilson and Goldberg articles. The Zeisel fragment referred to in Witherspoon's petition for certiorari was apparently withdrawn.

The Supreme Court noted in *Witherspoon* that the items which it was asked to judicially notice had not been introduced into evidence or subjected to the fact-finding process. Therefore, the Court was left to: "... speculate . . . as to the precise meaning of the terms used in the studies, the accuracy of the techniques employed and the validity of the generalizations made." *Id.* at 517 n. 11, 88 S.Ct. at 1774 n. 11. The Court ultimately refused to find, based upon the record or judicial notice, "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt . . ." *Id.* at 517-18, 88 S.Ct. at 1774-75. By this determination the Supreme Court refused to adopt a *per se* guilt phase rule. Instead, it invited further study, leaving it open for future defendants to attempt to prove that juries death-qualified by *Witherspoon* standards were "less than neutral with respect to guilt." See *id.* at 518, 88 S.Ct. at 1775.

The petitioners in the case at bar have responded to the Supreme Court's invitation with a plethora of well-documented scientific research that does not suffer from the numerous deficiencies attributed to the

research in *Witherspoon*. The manuscripts of the Zeisel and Goldberg studies, relied upon by petitioners here are thorough and complete, whereas earlier versions of those studies, which the Supreme Court reviewed in 1968, were both unpublished and incomplete. And the record establishes that the Supreme Court had only a five-to-eight page fragment of what became a fifty-page monograph by Dr. Zeisel. More importantly, this fragment did not include Dr. Zeisel's depiction and explanation of his data in what became Table 9 of that monograph.

As has been noted in the first *Grigsby* decision, the group excludable after *Witherspoon* (5 above) is a smaller subset of the group excluded in the *Witherspoon*'s trial itself (4 and 5 above).⁶ But the questions remained: (1) Are there among those in the group adamantly opposed to the death penalty (the WEs) persons who could fairly and impartially try the guilt/innocence issue if they did not have to participate in the sentencing phase, and (2), if so, does the exclusion of such persons deprive the defendant at the guilt phase of a representative jury (see discussion *supra*), or result in a jury that is more prone to convict than would be a jury from which such persons were not excluded?

The term "nullifier" is used to describe a prospective juror who states that he would be unable to

6. But quare? See the discussion of the use of peremptory challenges in capital cases, *infra*.

try the issue of the defendant's guilt/innocence upon the basis of the evidence and the law. In the death-penalty context this is the person who would say, "I cannot vote a defendant guilty regardless of the evidence if I know that, should he be convicted, someone else [the court or some other jury] might impose the death penalty." These nullifiers are described in *Witherspoon* as those persons who make it unmistakably clear that their attitude toward the death penalty "would prevent them from making an impartial decision as to the defendant's guilt." See 391 U.S. at 513, 88 S.Ct. at 1772. It is, of course, agreed by all that "nullifiers" are properly excluded from both the guilt/innocence phase and the sentencing phase of a capital case. But it is urged that no proper reason exists for the exclusion of the impartial WEs at the guilt/innocence phase. For this reason they are sometimes referred to as "Guilt-Phase Includables."

Using this terminology all "*Witherspoon* Excludables" (WEs) may be divided into "Nullifiers" and "Guilt Phase Includables."

This court must decide on the basis of the evidence presented if there are differences, material to jury performance, between those qualified to serve under *Witherspoon* standards and those who are excluded by such standards.

B. The Evidence.

Since 1968, the Zeisel and Goldberg studies have been completed and published. Both have been

subjected to intensive peer review. In addition, to meet one of the objections stated by the Supreme Court, the petitioners here in *Grigsby* have offered extensive expert testimony explaining "the meaning of the terms used in" the Wilson, Zeisel and Goldberg studies which tend to verify the "accuracy of the techniques employed" and to demonstrate "the validity of the generalizations made." See *id.* at 517 n. 11, 88 S.Ct. at 1774 n. 11.

More importantly, however, petitioners have not only introduced the end products of the Wilson, Zeisel and Goldberg studies, but they have supplemented same with six more extensive attitude surveys, to wit, the four *Bronson* studies, the *Harris* 1971, and the *Ellsworth/Fitzgerald* 1979. In addition, seven more sophisticated conviction-proneness studies were introduced, to wit, *Harris* 1971, *Jurow* 1971, and the five *Ellsworth* 1979 studies. In addition, the plaintiffs have introduced national and Arkansas-specific demographic data, as well as the *Haney* 1979 study (which suggested the ill effects of the process of death qualification) which were not raised or even suggested to the Supreme Court in *Witherspoon*.

The petitioners called three expert witnesses and three lay witnesses to testify during the hearing. They testified about their own studies and those of other social scientists referred to above.

1. Petitioner's Expert Testimony.

Petitioners' three experts were: Dr. Edward J. Bronson, Dr. Craig William Haney, and Dr. Reid

Hastie. The Court was impressed with the professionalism of these experts, their candor, the quality and rigor of their own studies, and their careful and objective appraisal of the studies and work of other scholars who have dealt with the issues before the Court. A brief review of their qualifications is in order.

Dr. Bronson is a Professor of Public Law and Political Science at California State University at Chico. In addition to a B.S. and J.D. degrees, he holds a LL.M. degree from the New York University School of Law, and a Ph.D. in Political Science from the University of Colorado. As a social scientist, Dr. Bronson has worked with various officials of the criminal justice system including prison officials, law enforcement officers, and parole officers. He has conducted four studies on the relationship between persons' attitudes on the death penalty and their attitudes on other criminal-justice related issues. See, e.g., Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 Woodrow Wilson J.L. (1981); Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Venireman*, 42 Colo. L.Rev. 1 (1970).

Dr. Haney is a Professor of Psychology at the Santa Cruz campus of the University of California. He received a Ph.D. in psychology and a J.D. from Stanford University in 1978. In addition to research and studies in empirical research methodology (Dr. Haney has published numerous articles on research

methodology), his substantive area of research has emphasized the relationship between psychology and the criminal justice system. He has conducted research on such subjects as plea bargaining, eye witness testimony, the effect of television on witness perception the impact of imprisonment on personality, and the use of *voir dire* in criminal juries to seek and impart information to prospective jurors. In addition, Dr. Haney has written on the subject of the value of social science to the courts. He participated in a study for the National Science Foundation on the Supreme Court's use of social scientific data, and he is a teacher of this subject to judges in his capacity as a faculty member of the National Judicial College. He conducted an experimental study in 1979 on the effect on jurors of exposure to the process of death qualification during *voir dire*. He has also discussed how the exclusion of veniremen opposed to the death penalty affects the range of attitudes on death-qualified juries as well as the demographic composition of those juries. He has extensively reviewed the literature on death-qualified juries and has published a survey of the relevant literature. See Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 1980 Crime & Delinq. 512.

Dr. Hastie is a Professor of Psychology at Northwestern University. He received his Ph.D. in psychology from Yale in 1973. He then joined the faculty of the Department of Psychology at Harvard and is currently an editor for the *Journal of Personality and Social Psychology*, and the *Journal of Experimental and Social Psychology*. His primary research

emphasis has been on juries and the jury decision-making process. See Penrod & Hastie, *Models of Jury Decision Making: A Critical Review*, 86 Psych.Bull. 462 (1979); Penrod & Hastie, *A Computer Simulation of Jury Decision Making*, 87 Psych.Rev. 133 (1980); Pennington & Hastie, *Juror Decision-Making Models: The Generalization Gap*, 89 Psych.Bull. 246 (1981). Dr. Hastie's study of the jury system has spanned eight years and has been funded by grants from the National Science Foundation, the National Institute for Law Enforcement and Criminal Justice and James Marshall Foundation. He has conducted no specific research on the effect of the death qualification process, but testified about the work done by other scholars.

In his testimony Dr. Bronson discussed the empirical evidence developed by him and other researchers on the question of how death qualification affects the attitudes and demographic composition of the resulting juries.

Dr. Haney testified concerning the relationship between death penalty attitudes and other criminal justice related attitudes. He also discussed the effect of death qualification upon the demographic composition of the resulting juries. He was principally concerned with the effect of excluding persons opposed to the death penalty upon the likelihood of conviction. But probably his most important contribution was his testimony concerning his own experiments on the effect of the death qualification *voir dire* procedures themselves upon the jurors who survived the *voir dire* challenges.

Dr. Hastie reviewed the research upon the effect of death qualification and discussed the effect of death qualification upon the attitudinal and demographic characteristics of both jurors and juries. He compared the relative conviction proneness of death qualified with non-death qualified juries and discussed the effects of death qualification upon the quality of the jury deliberation and the accuracy of the resulting jury's factfinding.

During their case in chief the petitioners also presented one lay witness, Mr. Dale Enoch, president of Precision Research, Inc., of Little Rock, Arkansas, who reviewed a demographic study which his company conducted in Arkansas.

The petitioners introduced 270 exhibits which included social scientific research on death qualification, articles on jury decision making, and graphic displays of the results of the social science research.

All of the petitioners' experts testified as to the relationship between death penalty attitudes and other criminal justice related attitudes. All agreed that the empirical evidence and data made it clear, in their professional opinions, that persons excluded by the process of death qualification share sets of attitudes toward the criminal justice system that set them apart and distinguish them collectively from those not excluded by that process. All were also of the opinion that death-qualified jurors are more prone to favor the prosecution, to be hostile to the defendant, to regard significant constitutional rights lightly, and to make

adverse judgments concerning minority groups than persons who adamantly oppose the death penalty (i.e., are not "death qualified"). Petitioners' experts were convinced that death-qualified jurors differ systematically from those excluded under *Witherspoon* standards. They relied, *inter alia*, upon the following scientific studies, some of which will be discussed later on herein:

Wilson, 1964
Bronson/Denver, 1970
Bronson/Butte, 1980
Bronson/Butte Followup, 1980
Bronson/Los Angeles, 1980
Goldberg, 1970
Harris, 1971
Ellsworth/Fitzgerald, 1979

The Court credits and accepts the said opinions of petitioners' experts and finds that these opinions are based overall on solid scientific data, reason and common sense.

2. Representative Cross-Section issue.

The Court particularly notes with respect to the Sixth Amendment "distinctive group" issue [one of the "roadblocks" in the Court's first *Grigsby* opinion] that both the *Bronson/Denver, 1970* study and the *Bronson/Butte County, 1980* study provide cogent evidence that persons who strongly oppose the death penalty (WEs) differ in significant ways attitudinally not only from those who "strongly favor" and "favor"

the death penalty but also from those who "oppose" the death penalty. The evidence shows that all three of the latter groups are much more likely than WEs to, among other things, disregard the presumption of innocence, to criticize the exercise of one's Fifth Amendment right to remain silent, to believe that courts are too concerned with protecting the rights of criminals, and to believe that the insanity defense is a loophole which allows the guilty to go free. As stated elsewhere herein, the Court finds that those excluded by death qualification are a distinct group and that no other of the death-qualified groups, not even those who hold milder scruples against the death penalty, can adequately represent their point of view or life perspective.

All three of the petitioners' experts testified as to the relationship between death penalty attitudes and demographic characteristics. All three expressed the opinion that the process of death qualification has the inevitable effect of decreasing disproportionately and significantly the number of women and blacks eligible to serve as jurors at the guilt-innocence phase of capital trials. They based these opinions, *inter alia*, upon the following studies, all of which are in evidence:

Bronson/Denver, 1970
Bronson/Butte County, 1980
Bronson/Los Angeles, 1980
Goldberg, 1970
Harris, 1971
Ellsworth/Fitzgerald, 1979

and upon national opinion polls. The Precision

Research, Inc. Arkansas demographic survey also supports those opinions.

The Court credits and accepts these opinions of petitioners' experts finding that the above studies provide strong support therefor. Taking the studies overall, the Court finds that the differences between the attitudes of blacks and whites with respect to the death penalty is highly statistically significant. For instance Dr. Bronson totalled the attitudes by race for his three studies and found that only 5.8% of blacks strongly favor the death penalty while 30.4% oppose it. This compares with 20.4% of the whites who strongly favored the death penalty while only 9.9% strongly oppose it.

And the *Harris 1971* national demographic survey shows that, by virtue of their attitudes toward the death penalty, 46% of blacks would be excluded under the *Witherspoon* standard as compared with only 29% of the white subjects, a difference which is also highly statistically significant. And 37% of the women were WEs compared to only 24% of the male subjects.

The Arkansas "Precision Survey" used five death penalty positions on its spectrum: "strongly in favor," "somewhat in favor," "neither favor/oppose," "somewhat opposed," and "strongly opposed." Forty-five percent of Arkansas blacks indicated they were strongly opposed compared to 10% of the whites. Twenty-one percent of Arkansas women were strongly opposed compared to 8% of the men. The survey also indicated that even after excluding "nullifiers" 29% of

the blacks would never impose the death penalty compared to 9% of the whites. And, whereas only 8% of Arkansas men would be *Witherspoon* Excludables (After removing "nullifiers"), 13% of Arkansas women would fall into that classification. These results are consistent with national surveys over the past 30 years. So it is clear that the death qualification procedures which permit the removal of fair-minded prospective jurors from the guilt-innocence determination phase of capital trials solely because of their attitudes toward the death penalty will indirectly but inevitably result in the underrepresentation of blacks and women on such juries in Arkansas.

Although the percentage figures differ in the various studies, all confirm the great difference in attitude between blacks and whites and between men and women on the death penalty. And even though such attitudes change back and forth over time the demographic differences referred to have steadily persisted and continue to persist.

Dr. Gerald Shure, the respondent's expert, apparently agrees that death qualification disproportionately excludes blacks. The State offered no credible evidence to the contrary.

Blacks and women constitute significant and distinctive groups of jury-eligible citizens within Arkansas and the Nation. Death qualification results in their systematic disproportionate removal from juries which try the guilt-innocence of persons accused of capital crimes, without adequate justification, in

violation of the accused's right to a representative jury comprised of a fair cross-section of the community.

3. Conviction Proneness Studies

All three of petitioners' experts testified concerning the "conviction proneness" of death-qualified juries. They testified that in their professional opinions "death-qualified" jurors (i.e., persons whose attitudes toward the death penalty qualify them to serve) are substantially more likely to convict a defendant charged with a serious crime than would be prospective jurors who are not qualified to serve because of their adamant opposition to the death penalty but who could, nevertheless, fairly try the guilt-innocence issue in capital cases.

Dr. Bronson based his opinion that death qualified jurors are more prone to convict upon the amalgam of associated pro-prosecution attitudes which are shared by persons who strongly oppose the death penalty. He believes that such prosecution-prone attitudes are convincing predictors of the voting behavior of such persons when they are chosen to try the guilt-innocence of a person accused of a capital crime.

Dr. Hastie and Dr. Haney relied upon the attitudinal studies referred to above and also upon many other studies comparing the propensity of death-qualified and non-death-qualified jurors to convict. Among those studies they relied principally upon the following:

Zeisel, 1986

Wilson, 1964

Goldberg, 1970

Jurow, 1971

Harris, 1971

Ellsworth et al, Conviction Proneness and Related Studies, 1979

The last cited is a composite of several studies which includes *Ellsworth, Thompson and Cowan, Conviction Proneness Study and Related Studies by Ellsworth, Harrington, Thompson, Cowan and Bukaty.*

Professor Zeisel collected his data in 1954-55; Dr. Goldberg collected hers in 1967-68; and for the rest the date was collected in the years indicated for the report.

The Court credits the opinions of petitioners' experts on the guilt proneness of death-qualified juries, finding same to be based upon reliable empirical data, reason, and common sense.

Arkansas practice to the contrary, see below, before *Witherspoon*, death qualification in capital trials in most states worked differently. Commonly, all persons having scruples (even the slightest) against the death penalty were removed. So researchers during that period studied whether a jury composed by excluding all persons having death penalty scruples was more likely to convict than a jury composed of persons having no such scruples. *Zeisel 1968, Wilson 1964, and Goldberg 1970* relied upon data collected before *Witherspoon* and analyzed that data on the basis of the pre-*Witherspoon* legal test. Although it might be

contended that these pre-*Witherspoon* studies are of limited relevance, the Court finds them to constitute a significant contribution to the overall scientific research in this area. The post *Witherspoon* studies are obviously more directed to the issue before the Court and benefit from greater sophistication, but, nevertheless, the direction and thrust of the earlier studies have been corroborated and reinforced by the later studies, all of such studies showing a remarkable degree of consistency in their findings.

a. *Wilson 1964.*

In the *Wilson 1964* study, which utilized 187 Texas college students and 61 New York students, the subjects were given brief written descriptions of five criminal cases. They were also asked questions to determine which had scruples against the death penalty. The *Wilson* study was one of the first to show that persons without scruples against the death penalty are more likely to convict than people with such scruples. It also showed that non-scrupled "jurors" were more confident in their guilt determinations, would impose heavier penalties, and appear more biased in favor of the prosecution. This study has its problems: it used college students as subjects; it concentrated on predicting the behavior of individual jurors, not juries; it did not take into consideration the possible effect of group deliberations; and it did not focus on the post-*Witherspoon* legal issue. But *Wilson* revealed the nexus between death penalty attitudes and conviction behavior.

b. *Goldberg 1970*

The *Goldberg 1970*, reflecting studies made in 1966-67, obtained results consistent with, and in the same direction as, those found by *Wilson*. But that study is subject to many criticisms in addition to those levelled at *Wilson*, and its results cannot be said to be statistically significant.

c. *Zeisel 1968*

The *Zeisel 1968* is a study of the voting behavior of person who had actually participated in criminal felony trials in Chicago and Brooklyn. Professor Zeisel and his assistants contacted jurors present in the jury room at the end of the last day of their eligibility to serve and asked if they cared to be interviewed for a study on jury behavior. Approximately two-thirds agreed to participate. The stimulus used was a group of actual felony trials in Chicago and Brooklyn. The subjects were asked: (1) whether they had scruples against the death penalty; (2) if they had sat on a jury that actually deliberated in criminal cases; (3) if so, how did they vote on the first ballot; and (4) what was the vote of the entire panel of twelve on the first ballot.

Dr. Zeisel hypothesized that the general thrust of the evidence would be indicated by the number of guilty votes on the first ballot. He excluded unanimous first ballot votes since they would not reveal potential differences. There remained 464 *split* first-ballot votes to analyze. To control for the strength of the evidence

he divided these into eleven "constellations." One group would be the situation where the split ballot was 11:1 for guilt; the next 10:2; and so forth until 1:11. He knew from his and other studies that the first ballot vote was an extremely accurate predictor of the final verdict. And he viewed it also as an accurate measure of the strength of the evidence. He then compared the voting behavior of the scrupled and non-scrupled jurors, within these eleven constellations. The results appear to support his concept concerning the strength of the evidence since the proportion of subjects voting guilty—whether scrupled or non-scrupled—turned out to be functionally related to the number of first ballot guilty votes.

Professor Zeisel's data showed that in nine out of the eleven "constellations" non-scrupled jurors voted to convict more often in cases of like evidentiary strength than scrupled jurors, and in ten out of eleven cases of like evidentiary strength scrupled jurors voted to acquit more often than non-scrupled jurors.

This study is fascinating because it accepts that lawyers and judges know intuitively: when the strength of the evidence is great enough "conviction-proneness" and "acquittal proneness" become non-issues. And split first ballot votes are good indicators of the strength of the evidence. Guilt proneness and acquittal proneness become more and more important as the strength of the evidence diminishes.

Looking at Table 9 of petitioner's Exhibit Ch-5 one can see the difference between the proportion of

scrupled and non-scrupled jurors voting guilty as a function of the strength of the evidence. At what evidentiary strength will scrupled and non scrupled jurors reach the point of equal likelihood of voting guilty or not guilty? The answer appears to be when the vote is 4-8 (i.e., only 4 guilty votes) for the non-scrupled jurors and almost the reverse for the scrupled jurors. So non-scrupled jurors are at the "equal likelihood" point when the strength of the evidence is relatively weak whereas the strength of the evidence must be fairly strong before the scrupled juror reaches that point of equilibrium.

The Zeisel study was conducted by one of the leaders in forensic social science in this nation. Dr. Zeisel has been Professor of Law and Sociology at the University of Chicago since 1952. He is the co-author with Harry Kalven, Jr., of *The American Jury* (1966). His work has been cited and relied upon by the U.S. Supreme Court, the California Supreme Court and others. Since his study used actual trials and actual jurors it avoids some of the arguments (mostly unfounded) directed at the unreliability of simulation. So his work demonstrates that significant differences between the conviction behavior of scrupled and non-scrupled jurors are not limited to simulated situations. Of course, that work did not focus on the narrower post-*Witherspoon* test since it was performed long before the *Witherspoon* decision.

The post-*Witherspoon* studies of the guilt proneness of death-qualified juries meet many of the criticisms of the earlier studies. First, they focus more

precisely upon the correct issue. Second, the methodology has improved.

d. *Jurow 1971.*

Jurow 1971 is a study of the effect of death qualification upon guilt determination. It was conducted by Professor George Jurow then on the faculty of City University of New York. He is both a lawyer and a psychologist. His work was funded by the Department of Justice's LEAA and is published as Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 Harv. L.Rev. 567 (1971). He used as subjects 211 employees of a Sperry Rand Corporation plant on Long Island. The sample was non-random, 99% of which were white and 80% of which were male. One third of the subjects had prior jury service. Professor Jurow had the subjects fill out the two-part Capital Punishment Attitude Questionnaire (CPAQ) to determine attitudes toward the death penalty and to assess how the subject would consider the death penalty if serving on a jury. The attitude question and the percentage distribution of those choosing each attitude are as follows:

Capital Punishment Attitude Questionnaire (CPAQ), Part B, and
Percentage distribution of subjects endorsing each alternative

Percentage Assume you are on a jury to determine the sentence for a
Choosing defendant who has already been convicted of a very serious
crime. If the law gives you a choice of death or life imprisonment
or some other penalty: (Circle only one)

- 10% 1. I could not vote for the death penalty regardless of the facts and circumstances of the case.

- 20% 2. There are some kinds of cases in which I know I could not vote for the death penalty even if the law allowed me to, but others in which I would be willing to consider voting for it.
- 63% 3. I would consider all of the penalties provided by the law and the facts and circumstances of the particular case.
- 5% 4. I would usually vote for the death penalty in a case where the law allows me to.
- 2% 5. I would always vote for the death penalty in a case where the law allows me to.

Professor Jurow then asked the subjects to vote guilty or not guilty in two cases presented by audio-tapes. The first tape was thirty-three minutes long and involved the alleged murder of a liquor store proprietor during a holdup. The second was about an hour long and involved charges that a narcotic addict robbed, raped and killed a girl in her apartment.

After the subjects voted, Professor Jurow compared their voting behavior in relation to their death penalty attitudes. The results are as follows, with class 1 representing the *Witherspoon*-excludables:

Relationship between Death-Penalty Attitude and Verdict

CPAQ-B Statement Endorsed	Number Voting Guilty	Number Voting Innocent	Within-Group Majority Vote
Class			
1	7	14	67% Acquit

Relationship between Death-Penalty Attitude and Verdict

CPAQ-B Statement Endorsed	Number Voting Guilty	Number Voting Innocent	Within-Group Majority Vote
2	12	30	71% Acquit
3	59	73	55% Acquit
4	10	1	91% Convict
5	4	1	80% Convict
Case II			
1	9	12	57% Acquit
2	25	17	60% Convict
3	78	56	57% Convict
4	9	2	82% Convict
5	4	1	80% Convict

In Case I he found that the stronger the subject's views were in favor of the death penalty the more likely that subject would vote to convict. He found the same relationships in Case II but the differences in Case II were not statistically significant.

Even though Jurow was looking at juror behavior, rather than *jury* behavior, his study provides additional probative evidence of the relative tendency of death qualified jurors to convict, a result which is consistent with those of prior studies.

None of the above studies employed a random sample of subjects. Random samples are necessary if the object is to determine the incidence of certain characteristics in a given population. But they are not necessary in studies used to compare the behavior of people with different characteristics.

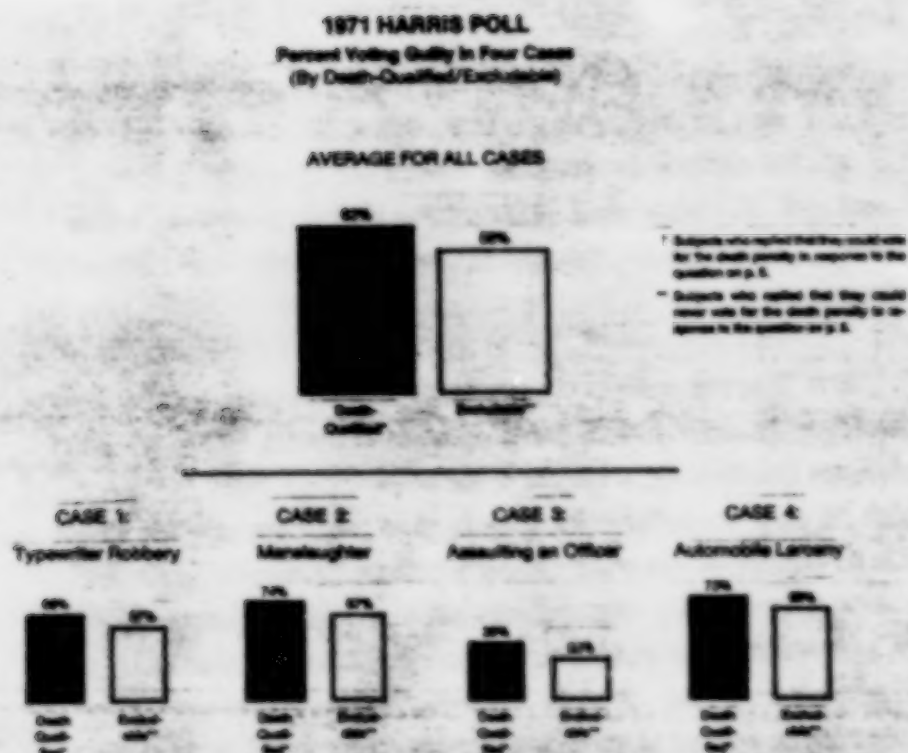
e. Harris 1971.

The *Harris 1971* study did employ a random sample of subjects. It was conducted by Louis Harris and Associates. The results in part were published in White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 Cornell L.Rev. 1176 (1973). The full *Harris* report has been introduced into evidence and reviewed by petitioners' expert witnesses.

The subjects of the *Harris* study consisted of a stratified national probability sample composed of 2,068 adults drawn from the "lower forty-eight" states (all except Alaska and Hawaii). Fifty percent were women. Seventeen percent were black or other minorities.

Each *Harris* subject was interviewed personally in his or her home. Each was asked certain attitudinal questions including whether, in a murder trial, "there would be any situation in which you might vote for the death penalty, or do you think you could never vote for the death penalty, regardless of the circumstances?" This question adequately identified the *Witherspoon* Excludables. The study used four criminal case descriptions as the stimuli, preceded by a set of general instructions intended to be like those which a court would give in a criminal trial, touching on such subjects as burden of proof, the reasonable doubt standard, the defendant's right not to testify and the juror's duty to apply only the legal definition of the crimes charged. The subjects were asked to vote guilty or not guilty on

each of the four cases. The results are graphically depicted as follows:



In all four cases death qualified jurors voted to convict more often than *Witherspoon* Excludables. In the first three cases the difference was highly statistically significant (p . .01). In the last case the difference was only marginally significant. Overall, death qualified jurors voted to convict in 63% of the cases compared to 56% by *Witherspoon* Excludables.

Even though it did not examine the effect of jury deliberations, the *Harris 1971* study provides additional convincing evidence that death qualified juries are conviction prone.

Both *Jurow* and *Harris* lacked one necessary refinement. As pointed out above, *Witherspoon* Excludables include "nullifiers" who, everyone agrees, may be removed at both the penalty and the guilt-innocence phases of capital trials. Since they could not in any event serve, the Harris-Jurow tests might be considered too inclusive to indicate whether a subset of *Witherspoon* Excludables, described above as "Guilt Phase Includables," differ in conviction behavior from those who are death qualified. The comparison needs to be made between death qualified (i.e., jury eligible subjects) and WEs, excluding nullifiers. Which brings us to the study by Phoebe Ellsworth and her colleagues.

f. *Ellsworth 1979.*

Ellsworth 1979 is made up of five studies undertaken by Dr. Phoebe Ellsworth and her colleagues

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Dr. Joan C. Harrington, Dr. William Thompson, Dr. Claudia Cowan and Raymond M. Bukaty in 1979. The studies were designed to replicate the results of earlier studies using more sophisticated experimental and control techniques and to attempt to gain some insight into the reasons that death-qualified jurors might be more conviction prone than non-death qualified jurors who could fairly try the issue of guilt-innocence in capital trials.

The transcript of Dr. Ellsworth's testimony in the *Hovey* case was received in evidence here. Dr. Haney relied upon that transcript together with the studies themselves for the purpose of explaining the full thrust and effect of those studies. It will be recalled that the California Supreme Court found Dr. Ellsworth's work very persuasive.

The subjects of the Five *Ellsworth* studies were all drawn from the same panel of 288 adult, jury-eligible citizens in Santa Clara and San Mateo counties in California. They were recruited by using a jury list from the local court and by advertising for volunteers. Forty-five percent had prior jury service. Each subject was read an introductory statement and was asked to assume that he or she was a prospective juror in a criminal case being questioned by a judge. The statement explained the bifurcated process by which capital trials are presently conducted in this country. Each was then asked the following question:

Which of the following expressed what you would do if you were a juror for the first (guilt/innocence) part of the trial?

- a. I would follow the judge's instructions and decide the question of guilt or innocence in a fair and impartial manner based on the evidence and the law or
- b. I would not be fair and impartial in deciding the question of guilt or innocence, knowing that if the person was convicted he or she might get the death penalty.

Those who chose (b) were then excluded from participation in any of the studies. This eliminated the "nullifiers," leaving only those who could sit as impartial jurors at the guilt-innocence phase of capital trials.

The subjects were also inquired of as follows:

The judge will ask you this question: Is your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was or would you consider voting to impose it in at least some cases?

- a. I would be unwilling to impose it in any case.
- b. I would consider voting to impose it in some cases.

The answers identified the *Witherspoon* Excludables, or, more precisely, the "Guilt Phase Includables" (since the nullifiers had already been removed) on the

one hand and identified those who were death-qualified on the other hand. With this information Dr. Ellsworth and her colleagues were able to compare the voting behavior of the subjects in all five studies. The final sample was composed of 258 death-qualified subjects and 30 WEs.

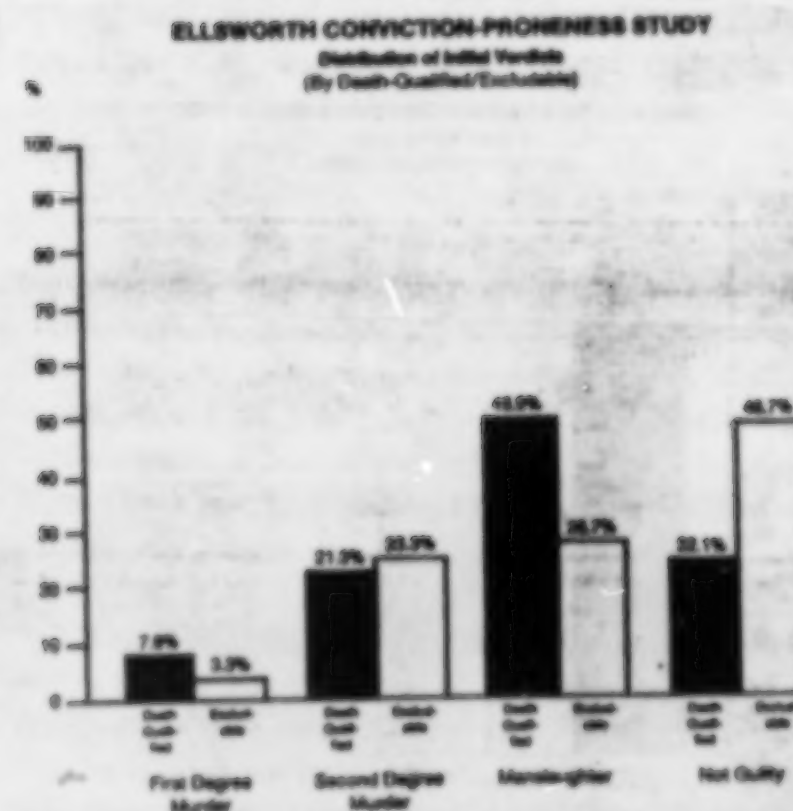
The *Ellsworth* studies did not use random sampling techniques. In fact they often restricted the number of WEs so that, in the deliberation studies, simulated juries could be composed of differing percentages of WEs, i.e., so that such 12-person juries could have 0, 1, 2, 3 or 4, but not more than 4 WEs.

Since random techniques were not employed no claim is made that it is possible to generalize from the numbers of WEs and death-qualified in the subject pool to the population at large.

In the *Ellsworth Conviction Proneness Study 1979*, hereinafter *ECPS 1979*, the stimulus used was a 2-hour videotape re-enactment of an actual murder trial in Massachusetts. It was prepared by Dr. Hastie for use in his own work and was loaned to Dr. Ellsworth for her study. She revised it somewhat and substituted California jury instructions. The tape included opening statements, the direct and cross-examination of seven witnesses, closing arguments and one-half hour of jury instructions. It was filmed in a Massachusetts courtroom using a judge, a prosecutor and a defense attorney to portray those same roles in the film. Probably no simulation, even of an actual trial, will be completely satisfactory to an experienced judge or

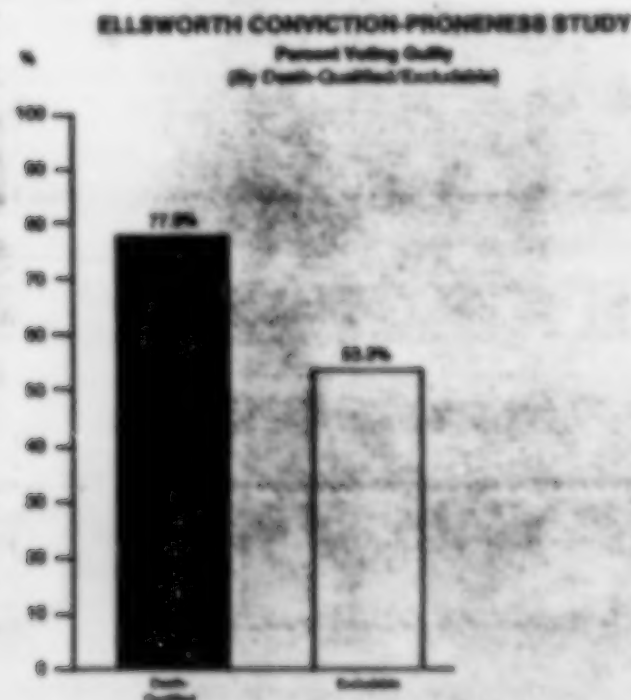
lawyer. But the Court finds this videotape to be a high quality and realistic stimulus. The tape is in evidence in its entirety.

After viewing the videotape each subject was asked to vote for one of four verdicts: (1) guilty of first degree murder, (2) guilty of second degree murder, (3) guilty of voluntary manslaughter, or (4) not guilty by reason of self-defense or excusable homicide. The results were as follows:



It will be seen that most voted for manslaughter or acquittal. Few voted for first or second degree murder. Among these there were not significant differences but when the manslaughter and not guilty votes are considered the typical pattern emerges. About half of the death-qualified jurors voted to convict of manslaughter while only approximately one-fourth of the *Witherspoon* excludables so voted. Put another way 46.7% of WEs voted to acquit as compared with 22.1% of the death-qualified.

Considering only guilty and not guilty votes this study shows a 25% greater guilty vote by death-qualified subjects compared to WEs (77.9% versus 53.3%). Note the following graph:



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Dr. Ellsworth then proceeded to determine the effect that systematic exclusion of WEs would have on the number of not guilty votes in a case such as that portrayed. She assumed that 17.2% of the jury eligible population would be made up of WEs. The Court finds this to have been a valid assumption based upon the attitudinal surveys. She then determined that such systematic exclusion would result in 31% fewer initial votes to acquit. Using the accepted and familiar method of multiple regression (so frequently used in racial discrimination cases), Dr. Ellsworth excluded other possibly relevant factors that might arguably account for such differences, e.g., age, gender, area of residence, or prior jury experience. This study provides strong evidence of the opinion, so often expressed by petitioner's experts, that death penalty attitudes are a far better predictor of juror voting behavior than any other single characteristics.

The results of this study are significant and demonstrate that persons who are death-qualified by *Witherspoon* standards are substantially more likely to vote acquit than are persons excluded by those standards. This study marks the culmination of some fifteen years of research demonstrating the divergent juror voting propensities of death-qualified versus excludable jurors.

Can the behavior of *juries* be predicted from the results of studies revealing the attitudes and voting behavior of the individual *jurors*? Dr. Hastie answers this in the affirmative, basing his opinion in part upon the findings of Hans Zeisel and Harry Kalven in *The*

American Jury. One of those findings, based upon extensive empirical investigation, is that the first ballot preferences of a majority of jurors in a given case is the single most accurately predictive factor in determining the final verdict outcome by that jury. Since first ballots are frequently taken prior to any extensive jury deliberations, the attitudes which each juror brings to the jury room turn out to be very important in explaining the differences that surface upon the initial ballot. The evidence shows that there is a strong propensity for *initial majority* verdicts to be the same as the *final unanimous* verdict. Therefore, studies of individual juror attitudes provide reliable information about final jury verdicts.

Dr. Hastie's own studies also support his opinion. His research shows that "initial faction size" constitutes the best predictive factor in determining final verdict outcomes, i.e., the verdict initially selected by the largest faction will most likely become the jury's final verdict. So the extent of initial agreement, prior to jury deliberation, is most often decisive of the final outcome.

The Court finds that the systematic exclusion of WEs from capital juries will reduce the number of cases with an initial majority, or largest faction, in favor of acquittal or in favor of a lesser included offense and will thereby substantially lessen the likelihood of acquittal and the likelihood of a vote of guilty to a lesser-included offense when the final unanimous jury verdict comes in.

The other four *Ellsworth* studies (post-deliberation, credibility, "regret" and insanity defense) were intended to go beyond simply revealing whether death-qualified jurors are more likely to convict. Those studies attempt to also determine *why* such divergent voting patterns occur.

Immediately after viewing the videotape and voting, 228 of the 288 subjects participated in another study to determine the effect of jury deliberations on juror voting behavior. The subjects were divided into nineteen 12-person juries and told to deliberate toward a verdict for one hour. Approximately one-half of the juries were fully "death-qualified." The other half were "mixed," each with up to four, but not more than four, WEs. Dr. Ellsworth limited the number of WEs to four or less in order to realistically reflect the likely makeup of juries on the assumption that WEs would comprise between 10% and 20% of the population, a valid assumption.

After one hour of deliberations, Dr. Ellsworth and her colleagues called a halt and asked the subjects to fill out another verdict form, a memory test (concerning facts revealed at the videotape "trial") and a questionnaire in which the subjects rated the credibility of the seven witnesses who testified during that "trial."

The court is convinced, and so finds, that whereas the effect of jury deliberations can never be predicted in any particular case, it is possible to simulate realistic jury deliberation and to study scientifically the effect of jury deliberations on juror voting behavior.

Although there were some unexplained lost subjects, the study revealed the same voting pattern, based upon death penalty attitudes, after deliberations as before. Death-qualified subjects voted to convict between 20% and 25% more often than non-death qualified subjects. These results are significant and show that, on a statistical basis, jury deliberations do not completely wipe out or neutralize the voting propensities of individual death-qualified or excludable jurors.

Another finding made by Dr. Ellsworth which accords with intuitive common sense is that subjects who sat on "mixed" juries remembered the facts more accurately than subjects serving on juries composed of only death-qualified persons. This finding reinforces the legal requirement that juries reflect as nearly as possible a cross-section of the community and the variety of ideas, attitudes and opinions that exist therein. It is true that this will create a greater probability of argument and friction within such a jury, but, according to the evidence, logic and common sense, it also creates the likelihood of verdicts more accurately based upon the law and the evidence assuring as it does more vigorous and robust deliberations.

g. Haney 1979.

In 1979 Dr. Haney conducted a study of the effects of the death qualification *voir dire* process on jurors

who survive that process and thereby go on to serve on capital juries.⁷

Dr. Haney's work adds an entirely new and different dimension to the problem. Since the results of his study appear to confirm the "gut" opinions of those who daily operate in the courtroom environment it is important to review it even though no one contends that social science research on that problem is other than in its infancy.

The subjects of Dr. Haney's study were 67 jury-eligible adult men and women from Santa Cruz, California. He screened all prospective subjects and excluded those who (1) were not jury-eligible, (2) could not be fair on the issue of guilt (nullifiers) in capital cases, and (3) those who stated they could not impose the death penalty under any circumstances (WEs). He then used two videotapes as his stimuli. Half of the subjects viewed one take; half viewed the other. The first portrayed a two-hour *voir dire* of prospective jurors, one-half hour of which was devoted to the death-qualification process. The second videotape was identical to the first except that the death qualification part was eliminated. Both tapes are in evidence.

7. Respondent argues that this issue is barred by *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1972), because, it is asserted, petitioner did not ask that the jury not be *voir dired* at all pursuant to *Witherspoon*. But it is clear that both Mr. Grigaby and Mr. McCree asked that prospective jurors who would under no circumstances vote for the death penalty not be excused for cause at the guilt-innocence phase of their trials. If the motion had been granted there would have been no death-qualification process beyond that permitted to identify nullifiers under Section 43-1920, Ark. Statutes. See discussion of Arkansas law and of restrictions on *voir dire* herein.

Subjects were assigned to the two groups on a random basis. Both groups were told to assume that they were jurors participating in a real *voir dire*. They were then asked certain questions.

The results of the Haney 1979 study showed that jurors exposed to the process of death qualification during *voir dire*, simply by virtue of that exposure, as compared to subjects not exposed to that process, are (1) more predisposed to convict the defendant, (2) more likely to assume before the trial begins that the defendant will be convicted and will be sentenced to death, and (3) more likely to assume that the law disapproves of persons who oppose the death penalty and (4) more likely to assume that the judge, the prosecutor and the defense attorney all believe the defendant to be guilty and that he will be sentenced to die and (5) are themselves far more likely to believe that the defendant deserves the death penalty. Such findings were convincingly explained by recognized psychological principles.

One of the principal objectives lawyers have in wanting to *voir dire* the jury is to open up channels of communication, to start the process of persuading the jurors before they have even been selected and before any evidence has been introduced. If lawyers perform their adversarial and partisan roles on behalf of their clients their highest priority will be to obtain a jury which is *partial* to their client. An "impartial jury" might be their second choice, but, if they are performing their duty to their clients, they will, under accepted professional standards, be seeking to prevent

the impaneling of jurors they believe will be partial to their adversary and at the same time they will be seeking the impanelment of persons who they believe will be favorable to their clients. Only one person in the courtroom is charged with the direct responsibility of insuring the selection of a truly fair and impartial jury, and that is the judge. The controversy rages over the appropriate roles of the judge and the lawyers in the conduct of the process of *voir dire*. But one thing is clear: The process has its own effects. The process communicates attitudes and ideas to the prospective jurors. The process is a means of communicating and informing. The communication inherent in the process can be very positive or very negative on jury performance. Properly utilized, *voir dire* will reveal the information needed by the court, the lawyers and their clients to determine the existence of the predicate for any proper challenge for cause. It can also serve to enhance and inform the sense of duty and responsibility which each juror will feel and to emphasize that the objective of the process is, indeed, a fair and impartial jury.

The death-qualification process traps the participants into the necessity of communicating false cues to the jury. It is natural for prospective jurors to look to the participants, and particularly to the judge, for information about the case and what their duties and responsibilities will be.

By focusing on the penalty before the trial actually begins the key participants, the judge, the prosecutor and the defense counsel convey the impression that

they all believe the defendant is guilty, that the "real" issue is the appropriate penalty, and the defendant really deserves the death penalty.⁸ The process de-

sensitizes jurors to the gravity of their pre-penalty-phase duties. The experts have testified that a person's imaging of an event and publicly affirming one's commitment to it ("I could impose the death penalty") increases the likelihood that that person will allow that event to occur.

On each of the 16 questions posed by Dr. Haney to his two groups of subjects, the group that viewed the death qualification *voir dire* process gave more prosecution-prone answers and less defense-prone answers than did the group which did not see the death qualification *voir dire* process.

So, independently of the compositional effects of *voir dire*, and in addition thereto, the process itself increases the likelihood that the jury which ultimately sits will be more likely to convict than that same jury absent its exposure to that process. The process itself predisposes the "surviving" jurors to convict. The sequestration of prospective jurors is no solution according to Dr. Haney, because sequestration would only enhance such process effects in the juror's mind by allowing more time and attention to be spent focusing

8. The spectacle of the defense attorney being forced to lead and cajole a prospective juror who has expressed adamant opposition to the death penalty in order to prevent him from being "witherspooned" off the jury is striking: "Mr. A, don't you know that under some set of facts you could consider imposing the death penalty? Certainly if the evidence is bad enough you would be able to follow the law by considering imposing death?"

on the death penalty. And it is well known that, even without sequestration, death-qualification *voir dire* may take days or weeks in a capital case.

So, the predisposition of a death-qualified jury results from the compositional consequence of the process and also from the process itself. To summarize, death qualification skews the predispositional balance of the jury pool by excluding prospective jurors who unequivocally express opposition to the death penalty. The evidence, and particularly the attitudinal surveys discussed by Drs. Bronson and Hastie, clearly establishes that a juror's attitude toward the death penalty is the most powerful known predictor of his overall predisposition in a capital criminal case. That evidence shows that persons who favor the death penalty are predisposed in favor of the prosecution and are uncommonly predisposed against the defendant. The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will not, therefore, be composed of a cross section of the community. Rather, it will be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury "organized to convict."

As pointed out the Haney study provides strong empirical support for what trial lawyers and judges already know, and that is, that regardless of the

preconceptions which a juror might have before entering the courtroom, the questions and the answers and the dialogue pursued in the death qualification process have a clear tendency to suggest that the defendant is guilty. Death qualification, then, is comparable to saturating the jury pool with prejudicial pretrial publicity, which, as we know, is unconstitutional. See *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); and *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). But the death qualification process is worse because the biasing information is transmitted to the prospective jurors *inside the courtroom* and is imparted albeit unconsciously, not only by the attorneys *but also by the judge*. The reading of the *voir dire* transcripts in these cases makes this abundantly clear—so clear that the Court suggests that even without the strong empirical support of the *Haney* study, the Court could conclude on its own that a reasonable limitations on such *voir dire* procedures would be appropriate. Judges of our trial and appellate courts are qualified and able to assess the prejudicial effect of a questioning process employed during *voir dire*. They should, by training and experience, be considered to possess some expertise on the effects of courtroom procedures, such as *voir dire*, which they observe almost daily either directly or through review of transcripts from state and federal courts. Of course, it is reassuring to have the support of empirical data from qualified social scientists. But the determination

of just what is fair procedure, constitutionally, falls within the ken of the judiciary.⁹

III. *The Automatic Death Penalty [ADP] Issue.*

The Respondent State of Arkansas relies heavily upon the testimony and studies of Dr. Gerald H. Shure particularly with respect to the impact and significance of the "Automatic Death Penalty" issue.

In *Hovey v. Superior Court*, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal.Rptr. 128 (1980), the court noted that under California practice prospective jurors may be challenged for cause in capital cases not only if they are adamantly opposed to the death penalty, i.e. are *Witherspoon* Excludables (WEs), but also if they would always vote for the death penalty if the defendant were convicted, regardless of the evidence. The latter group of prospective jurors have become known as "Automatic Death Penalty" jurors (ADPs). See Table in Section II, *supra*. Although the California

9. The prejudicial effect of certain types of *voir dire* questioning has long been recognized by the courts without the aid of social scientific data. For instance no one would argue with the notion that asking potential jurors detailed questions about their views on liability insurance and insurance companies would prejudice the rights of the defendants in the standard personal injury lawsuit. One prejudicial effect is obvious. The jury's attention is diverted from the primary threshold question of liability to the secondary question of who will satisfy the judgment. So the courts have traditionally placed limits on *voir dire* to prevent obvious prejudice. And, of course, while fair practice should be required in every case, civil and criminal, no proceedings should be more carefully monitored than capital trials. For suggestions on appropriate limits on *voir dire*, see section on "The Peremptory Challenge Problem and Proper Limits on *Voir Dire*," below.

court appeared impressed with the studies and the evidence concerning the guilt proneness of *Witherspoon* Excludables (WEs), that court concluded that such studies were essentially irrelevant to the death qualification practices in California.

Here the State of Arkansas argues that the practice in Arkansas is like that in California in that it permits the elimination of both WEs and ADPs in capital cases. And it urges that none of the petitioners' studies adequately takes this into consideration.

[10] Petitioners first contend that this is a non-issue in the case before the court because (a) in Grigsby's case, his trial attorney attempted to determine if any of the prospective jurors were ADPs but, upon objection of the prosecutor, was denied that opportunity, and (b) in the trials of Hulseley and McCree no ADP questions were asked and no prospective jurors were excluded for cause on that ground. Although it appears to the Court that at the time of the trials of the petitioners neither defense counsel, prosecutors nor trial judges in Arkansas were fully aware of the "flip-side" of *Witherspoon* and consequently rarely if ever made inquiry to identify ADPs, still the law of Arkansas does, and did at the time of petitioner's trials, permit the ADP challenge despite the fact that it has been rarely used or understood.¹⁰ Furthermore it does not appear that Grigsby made the Court's denial

10. The Court so states with some hesitation. See discussion of Arkansas challenge law below.

of his right to identify and exclude ADPs an issue on his direct appeal, and, of course, it does not appear that in the case of Hulseley or McCree defense counsel sought, but were denied, such an opportunity.

Assuming that the ADP issue is before the court, it is important to point out that here, as contrasted with *Hovey*, the ADP issue has been directly confronted by the parties as to its relevance and its merits.

The defense in *Hovey* contended that the size of the ADP group was so small that its presence would not significantly alter the effect of removing the much larger WE group. But the Court there had no reliable data upon the basis of which it could make an informed judgment as to the size of the ADP group. So the Court in *Hovey*, like the United States Supreme Court in *Witherspoon*, did not feel that it had adequate empirical data before it to permit it to deal with the important constitutional issues at stake.

The State of Arkansas here, like the State of California in *Hovey*, i.e., the representative of the prosecution, has chosen to tender the ADP issue. It is important to first note the underlying inconsistency in arguing that the removal of WEs will not result in a jury more prone to convict and then arguing that such removal of WEs will not result in a jury more prone to convict if the defense is permitted to remove the Automatic Death Penalty group. In other words, the State, by embracing the ADP issue, has effectively conceded the validity of the a priori, intuitive, gut

feelings of all who actively and routinely participate in jury cases in nisi prius courts—the “fireside induction”—that WEs are acquittal prone and ADPs are conviction prone. So prosecutors, like defense counsel, albeit with some mild protests, know intuitively that this is so. More direct acknowledgment of this assumption may be found in the state’s arguments and the courts analysis in such cases as *People v. Ray*, 252 Cal.App.2d 932, 61 Cal.Rptr. 1, cert. denied, 393 U.S. 864, 89 S.Ct. 145, 21 L.Ed.2d 132 (1968), wherein the state argued that the inclusion of jurors opposed to the death penalty would result in an acquittal-prone jury (i.e., at the guilt-innocence trial) and *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), criticized elsewhere herein, and, indeed, in the dissent in the Eight Circuit’s decision in *Grigsby*. So here we find the state, on the one hand, implicitly accepting that ADPs are conviction-prone while challenging all of the research studies and empirical data which supports petitioners’ contention that a juror’s tendency or willingness to convict or acquit is linked to his or her attitude toward the death penalty.

Before dealing with the effect of removing both WEs and ADPs on the conviction proneness of the resulting juries, it is important to note the effect thereof on the representativeness of the resulting juries. Clearly, permitting the removal of the ADPs has an additional negative effect here by reducing even further the attitudinal diversity of resulting juries. (See discussion elsewhere herein on the appropriate definition of jury “neutrality” taking into consideration the historic “democratic” function of juries under our

Constitution.) Dr. Shure conceded this effect during his testimony. And, by reducing the range of views and decreasing counterbalancing attitudes, the effect will be to adversely affect the vitality, quality and reliability of jury deliberations. See *Ballew v. Georiga*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978).

And before addressing the effect of removing ADPs on the conviction-proneness issue the Court also notes its effect on the biasing tendency of the *voir dire* death-qualification procedures themselves as testified by Dr. Haney. Clearly, if additional questioning during *voir dire* is permitted to identify ADPs, the jurors’ attention is further focused on the penalty phase before the guilt-innocence trial has even commenced. This tends to induce the belief and expectation that the penalty phase is really the only issue and that the defendant will surely be convicted. By further inducing the jurors to assume the guilt of the defendant and to analyze their personal feelings about possible penalties, the additional inquiries needed to identify and remove ADPs will add to and reinforce the negative effects of permitting the *voir dire* questioning needed to identify and remove WEs.

And it bears repeating again and again that petitioners contend that *neither* ADPs or WEs should be removed during the guilt-innocence phase of the trial assuming they can honestly swear to try the issue of the defendant’s guilt-innocence upon the law and the evidence. By the same token they readily concede that *both* should be removed at the penalty phase of the trial if the state is seeking the death penalty. The state’s

position is that both groups should be removed from both phases of capital trials.

What is the effect of the respondent's evidence on the conviction-proneness issue? Dr. Shure, a professor of psychology and sociology at U.C.L.A., was the state's principal witness. His educational credentials are excellent and he has obviously had broad experience in computer assisted research and large scale simulations (for the Air Force). He has studied the effects of communication channels in problem solving, bargaining and negotiation, and pacifist behavior. He has participated in complex gaming studies for the Joint Chiefs of Staff and the State Department and has developed a computer assisted telephone interview system which has been of interest to the Census Bureau. But his interest and experience in the behavior of juries has been relatively limited. At the time he testified he had performed only one study but he had reviewed the literature extensively. He had testified on the issues we are concerned with about eight to ten times starting in August of 1979.

Dr. Shure found a consistent pattern in the findings of the studies tendered by petitioners. He felt those studies "made sense." He agreed that associated ideas do form a pattern. Taken as a whole he would not argue with the findings of those studies per se. However, he wondered what would be the effect of the introduction of other factors. Although Dr. Shure has made some reasonable criticisms and suggestions concerning the possibility of improving research techniques and better interpretation of existing

studies, he has not, in his general comments, successfully impeached the clear thrust and effect of petitioner's case. In many ways his testimony reinforces that of the petitioner's experts. The one area that should be dealt with specifically, however, is his ADP study.

Dr. Shure conducted a telephone survey in an area around West Los Angeles using 20 professional interviewers each contacting 20 subjects for a total of 400. Less than one dozen of these subjects had had prior actual jury service. After removing the "nullifiers," 369 remained. On the basis of the answers to questions used by Ellsworth, Dr. Shure classified 310, or 84%, as death qualified and 59, or 10%, as Witherspoon Excludables. [It is interesting to note in passing that his figures on the percentage of WEs is consistent with that found in many of the other studies.] Through the use of further questions, Dr. Shure reclassified the sample as follows: 84, or 22.8%, WEs; 123, or 33.3%, ADPs; and 162, or 43.9%, death qualified under California law. The ADPs result "amazed" Dr. Shure. It is so far out of line with all of the other evidence in this case that a further analysis is indicated.

The key question used by Dr. Shure in reclassifying his subject-respondents was whether they would vote for the death penalty in the following specific, although hypothetical, case: A drug addict allegedly broke into an apartment where a female college student and her boy friend were studying. The defendant allegedly shot and killed the boyfriend and

then raped the girl and shot her in the head five times. Despite this she lived although she was paralyzed, mute and partially blind.

It is clear that Dr. Shure did not follow the *Witherspoon* approach in attempting to identify ADPs. He did not inquire if the prospective juror would always vote for the death penalty if a defendant were convicted of the capital crime, regardless of the evidence. Rather the "juror" was asked if he would vote the death penalty in a specific heinous case.

Dr. Shure's study stands alone in the identification of such a high percentage of ADPs. The highest such percentage generated by other studies is around 2% and most studies fix the percentage at 1% or under. See Jarrow, *New Data on the Effect of a Death 'Qualified' Jury on the Guilt Determination Process*, 84 Harv.L. Rev. 567 (1971) (2%); The 1981 Harris Study, L. Harris & Assoc. Inc. Study No. 814002 (January 1981) (less than 1%); and the Arkansas Archival Study (1981) (less than 1%).

Dr. Shure did not maintain that his sample was representative. The West Los Angeles area included Bel Air, Beverly Hills, Venice, Brentwood and Westwood. And Dr. Shure acknowledged that area had recently had some highly publicized crimes; had few minorities; and was wealthy and conservative. The Harris study, on the other hand, did involve a carefully chosen representative national sample. The Court, while having the highest regard for Dr. Shure's sincerity, is convinced that he is completely "off the

map" on his estimate of ADPs. While the Court is willing to concede that local economic and other demographic considerations, and local experience with crime, will have some effect upon the percentages, most of the studies indicate that the percentage of ADPs will vary between .5% and 2.5%. Indeed the studies put the ADP population in Arkansas at between .5% and 1%. This compares with over 14% actually excluded as WEs.

In all fairness, Dr. Shure has acknowledged potential errors and omissions in his study. He does not view it as definitive. Rather that study has been put forth to question the conclusions reached in other studies. He has testified that his ADP figure "must be taken with a grain of salt" and that "I just can't believe the number of ADPs here" and that, "I do believe our figures are inflated and I don't understand why."

The Court finds and concludes that the number of those who would automatically vote for the death penalty in Arkansas and nationwide is negligible when compared to the number of those who would never under any circumstances vote for the death penalty. Therefore to give a defendant the right to challenge and remove ADPs contributes only to the appearances of fairness. In fact, so long as WEs are excluded from the guilt-innocence phase of the trial, the guilt-proneness of the resulting jury remains, to the great advantage of defendants.

These findings corroborate the intuitive judgment of the U.S. Supreme Court in *Adams v. Texas*, *supra*, to wit:

Finally, we cannot agree that § 12.31(b) is "neutral" with respect to the death penalty under that section the defendant may challenge jurors who state that their views in favor of the death penalty will affect their deliberations on fact issues. Despite the hypothetical existence of the juror who believes literally in the Biblical admonition "an eye for an eye," see *Witherspoon v. Illinois*, *supra* [391 U.S.], at 536 [88 S.Ct. at 1784] (Black, J., dissenting), it is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment. The appearance of neutrality created by the theoretical availability of § 12.31(b) as a defense challenge is not sufficiently substantial to take the statute out of the ambit of *Witherspoon*. *Id.* 448 U.S. at p. 49, 100 S.Ct. at p. 2528.

IV. *The Peremptory Challenge Problem and Proper Limits on Voir Dire.*

It is impossible to deal with the issues presented in this case without at least contemplating the effect thereon of the practice of permitting peremptory challenges, especially in felony and capital cases, where such a large number of such challenges are given to the parties.

Clearly the use of peremptory challenges can completely destroy the "representativeness" of the jury actually chosen to try the case. Also, if *voir dire* as to the jurors' attitudes toward the death penalty be

permitted in non-capital felony cases and in bifurcated capital cases (where the jurors have nothing to do with the assessment of the penalty), then peremptory challenges utilized on the basis of the results of such questioning could result in a conviction-prone or prosecution-prone jury even if no challenges for cause were permitted. In such circumstances the opposite also could occur: the exercise of peremptory challenges on the basis of the results of such *voir dire* questioning could result in an "acquittal-prone" or "defense-prone" jury.

In its first *Grigsby* opinion, this Court suggested the separate principles that appear to underlie and justify peremptory challenges. This Court has felt, on balance, that the granting of peremptory challenges has made the jury selection process fairer, or at least has made it appear to be fairer, than would be the case if such challenges were denied altogether. While still adhering to that view the Court recognizes that issues relating to use and number of peremptory challenges should be reexamined in the light of the empirical data that has been developed recently.

In *Peremptory Challenges in Capital Cases*, *supra*, Professor Winick reviews the data from a Florida study which demonstrates that prosecutors in the region studied systematically excluded mildly scrupled jurors in capital cases by peremptory challenges after first removing *Witherspoon* Excludables by for-cause challenges. The effect is essentially to return us to the pre-*Witherspoon* situation in which all, or almost all,

scrupled jurors (including the mildly scrupled ones) are removed from both the guilt and penalty phases of capital trials. If this is the general practice of prosecutors, it will greatly reinforce both the guilt proneness effect and the under-representativeness effect of the practices here challenged. Professor Winick's study provides a strong basis for arguing that, if state prosecutors are systematically using their peremptory challenges to get rid of non-*Witherspoon* Excludables who hold mild scruples against the death penalty, those prosecutors are violating *Witherspoon* itself for excluding scrupled jurors on a "broader basis" than their "inability to follow the law or abide by their oath." See *Adams v. Texas*, 448 U.S. 38, 48, 100 S.Ct. 2521, 2528, 65 L.Ed.2d 581 (1980). And this study also reinforces Dr. Berry's conclusion in his article '*Fireside Induction*,' see *infra*, that the "gut" judgment of both prosecutors and defense attorneys is that scrupled jurors across the board (even if in differing degrees) are less likely to convict than those who favor or have no scruples against the death penalty. For why else would prosecutors systematically use their peremptory challenges to remove mildly scrupled jurors?¹¹ Indeed, one of the experienced prosecutors who testified for the respondent in this case made it clear that if he could not remove a scrupled juror for cause on *Witherspoon* grounds, he would achieve the same result through the use of the state's peremptory challenges.

11. A more cynical view would be that they just want to circumvent the effect of *Witherspoon* at the penalty phase by excluding those mildly scrupled prospective jurors that *Witherspoon* says may not be challenged for cause. If successful they will end up with a "hanging jury," a jury "organized to return a verdict of death" as stated in *Witherspoon* itself.

Although the use of peremptory challenges, properly or improperly, is not before the Court, the issues are so interrelated that the subject cannot be ignored. The question of appropriate limits upon *voir dire* are raised in both contexts. Professor Winick's article offers some interesting suggestions on restructuring *voir dire* to prevent the abusive use of peremptory challenges. *Peremptory Challenges in Capital Cases*, *supra* at 82-90. The issue is narrower here because we are only concerned with the problem of identifying potential "nullifiers" without introducing the biasing effects of the usual death-qualification *voir dire* process. See *Haney* study, *supra*.

Since this Court has concluded that, if the State wishes to "death qualify" penalty juries, bifurcated trials will be required, see *infra*, the appropriate limits on *voir dire* appear obvious.

Witherspoon, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, and the first opinion of the Court in *Grigsby*, recognize that if prospective jurors hold attitudes toward the death penalty which would prevent them from making an impartial decision as to the defendant's *guilt*, such jurors may be challenged for cause. As noted elsewhere this simply reflects the more general rule that no one should be permitted to sit on the jury who is unable to try the case in accordance with the law and the evidence in keeping with the juror's oath. So, how are these potential nullifiers to be identified?

[11,12] In a bifurcated case in which the jurors who sit during the guilt-innocence determination phase have nothing to do with the assessment of the penalty, the question arises whether inquiries into the jurors' attitudes towards the death penalty should be permitted at *all* since they will have nothing to do with the assessment of the penalty. It may be argued that the *Lockett* case decided *sub silencio* that such inquiries are permissible in order to identify and remove the "nullifiers" described above. But this question has never been explicitly ruled upon by the Supreme Court. So the question remains: should death-qualification inquiries be permitted in the bifurcated trial situation and, if so, should those inquiries be limited to capital cases? The latter question is raised because some of the testimony in this case indicates, and at least one experiment suggested, that the conviction proneness of jurors who have strong feelings in favor of the death penalty appears to operate with respect to other than capital crimes—at least with respect to other crimes of violence such as assault and rape. An argument could be made that such *voir dire* should be permitted in these non-capital cases so that the state and the defense counsel would know how best to utilize their peremptory challenges. This Court strongly believes that such questioning should *not* be permitted in non-capital cases and doubts that it should be permitted in bifurcated capital cases (where the jurors will have nothing to do with the assessment of the penalty) absent some strong suggestion that the "nullifier" problem exists. In other words, if the court clearly explains to the jurors the alleged facts underlying the capital charge, and points out that the

jury chosen will be called upon only to determine the guilt or innocence of the defendant—and not the penalty—and then inquires of the panel if there be any reason why any of them could not fairly and impartially try the issue of the defendant's guilt in accordance with the evidence presented at the trial and the court's instruction as to the law, and none of the jurors respond, then, the Court suggests, further inquiries about the juror's attitudes towards the death penalty would be inappropriate. This is manifest if one accepts the evidence that such inquiries themselves will prejudice the jury even if no challenges for cause be permitted. Of course, if a juror indicates that there might be some reason that he or she could not fairly and impartially try the issue of the defendant's guilt, then that juror could be isolated from the other jurors and further inquiry made as to his or her reasons. If scruples against the death penalty were suggested as the reason, then further "death-qualification" questioning could be permitted and the juror excused for cause if it is established that he or she is in fact a "nullifier."

The suggested procedure would also tend to prevent the improper use of death-qualification information by the prosecution or the defense in deciding upon the use of peremptory challenges. See *Peremptory Challenges in Capital Cases, supra*.

It cannot be repeated too often: petitioners are simply asking that their guilt or innocence be determined by a jury which is chosen and composed in essentially the same way that juries are selected in over

99 percent of all criminal cases, i.e., in all non-capital cases. They accept that if such a jury were to convict them, and the state should continue to seek the death penalty, then the state will be entitled to have the penalty assessed by another jury which is properly death-qualified under *Witherspoon*, i.e., by a jury from which persons adamantly opposed to, and adamantly in favor of, the death penalty are removed for cause.

[13] Although the evidence before the court shows that attitudes toward the death penalty are usually coupled with "law and order" concerns on the one hand and "due process" concerns on the other, and thereby are good indicators of conviction-proneness or acquittal proneness, no one has yet argued that either those strongly in favor of the death penalty or those strongly opposed to it should be excluded in cases where the death penalty would never be an issue, e.g., in a simple robbery case. Indeed it is assumed that no inquiry into such attitudes would even be permitted in such non-capital cases, and this is as it should be because basic to the concept of a "jury" in a democratic society should be the *presumption of inclusion*, i.e., the presumption that all citizens are qualified to serve. Those urging exclusion should, and do, carry the burden of demonstrating good cause therefor. The right to serve on juries should be presumptively to be considered part and parcel of the status of adult citizenship.

[14] At first glance it may appear that the idea of a cross-section, "representative jury" is at war with the idea of an "impartial jury." Some would argue that for

jury service we should exclusively seek the detached, the uninvolved, the coldly objective—the archtypical "middle of the roader"—rather than the passionate partisans in our society. In the context of this case, the evidence shows, for instance, that those adamantly opposed to the death penalty are more likely to acquit in a close capital case and those strongly in favor of the death penalty are more likely to convict in such cases than their more "neutral" fellow citizens. But if persons in all three groups can in good faith and conscience swear that they can fairly and impartially try the issue of the defendant's guilt or innocence solely upon the basis of the evidence presented and the law as stated by the Court, may any such persons be challenged for cause on the basis of such attitudes or beliefs in the face of the constitutional mandate that juries shall be drawn from a venire composed of a representative cross-section of the community? The answer is, "no." And the empirical data in evidence supports the wisdom of the constitutional mandate. That evidence demonstrates, and common sense confirms, that the quality of the deliberations, the recall of the trial evidence, the likelihood of care and concern in understanding and applying the instructions of the Court as to the applicable law are all enhanced when there is broad diversity and heterogeneity in the jury's makeup. So we must eschew superficially appealing but false notions of neutrality which would, if applied, destroy the jury as a fundamentally democratic institution standing between the defendant and the awesome power of the state.

The Fifth Circuit in the case of *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), fell into error by not first identifying a constitutionally satisfactory definition of neutrality. This led the court to make the following statement:

That a death-qualified jury is more likely to convict than a non-death-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a non-death-qualified jury might favor the defendant.

Id. at 594. The court apparently did not note that the petitioners were *not* seeking a jury composed entirely of *Witherspoon* Excludables. On the contrary, they were seeking a jury drawn from the entire cross section of the community as a whole, including both those who strongly favored the death penalty and those who strongly opposed it. In other words, the petitioners in *Spinkellink*, as the petitioners here, were, as pointed out above, seeking the same kind of a jury that is mandated in approximately 99 percent of all criminal cases, i.e., all non-capital cases. One doubts that the Fifth Circuit would label all of those juries as likely to "favor the defendant."

Professor Winick's comments in his article *Peremptory Challenges in Capital Cases* are pertinent:

The Fifth Circuit has raised a more fundamental objection to inclusion of "automatic life imprisonment" jurors even in a bifurcated trial system. In

its view, a jury that included this group, rather than being neutral, might be biased in favor of the defendant, and therefore deny to the state its right to an impartial jury.¹²

12. Professor Winick's footnote to this statement is equally important. It states:

Smith v. Balkcom, 660 F.2d 573, 578-79 (5th Cir.1981); *Spinkellink v. Wainwright*, 578 F.2d 582, 594-96 (5th Cir.1978), *cert. denied*, 440 U.S. 976 [99 S.Ct. 1548, 59 L.Ed.2d] (1979). Underlying the Fifth Circuit's concerns may be the suspicion that "automatic life imprisonment" jurors may really be "automatic acquittal" jurors, although they swear at voir dire that they are not. However, any such suspicion could not alone justify the exclusion of these jurors consistent with the explicit holding of *Witherspoon* and *Adams* that the factual basis for a venireperson's exclusion on account of death penalty attitudes must be "unmistakably clear." * * * Moreover, if death penalty opponents constitute a cognizable class for sixth amendment cross-section purposes, see Section IV-B, *infra*, the exclusion of these jurors based on such suspicion would also violate the *Taylor-Duren* prohibition of the use of rough rules of thumb in the jury selection context.

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Indeed, if the Fifth Circuit's view is correct, prosecutors presumably should be able to interrogate venirepersons in noncapital cases (assuming that their prosecution proneness would apply there as well) concerning their view on the death penalty, and remove for cause those who could never impose it. Nowhere, however, is this allowed. Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQUENCY 512, 514 (1980) (The process of "death qualification" is "unique to capital cases. In no other instance are prospective jurors systematically queried about their attitudes toward a particular legal punishment and then excluded, as a matter of law, depending on how they answer.")

81 Mic.L.Rev. at 59 n. 199

569 F.Supp. - 30

This conclusion appears inconsistent with *Witherspoon's* central holding that excluding of "oppose death penalty" jurors results in an unconstitutionally death-prone jury. As applied to *Witherspoon's* facts, the Fifth Circuit approach would presumably call for affirmance of *Witherspoon's* death sentence on the basis that juries including "oppose death penalty" jurors are more life imprisonment-prone than death qualified juries, and therefore biased in favor of the defendant. But *Witherspoon* explicitly rejected this contention in favor of a jury that the Court deemed more impartial than one which excludes all death penalty objectors. *Witherspoon* thus suggests that if a capital jury resembling the jury that sits in the typical non-capital case—universally regarded as fair and impartial—is found to be significantly less conviction-prone than a death-qualified jury, then the latter would be constitutionally suspect as a trier of the defendant's guilt.

Peremptory Challenges in Capital Cases, *supra* at 59 n. 199

The only persons who are appropriately excluded from such juries for cause are those who indicate on *voir dire* that they will not be able to pass upon the guilt or innocence of the accused solely upon the basis of the law and the evidence. Therefore, if a person's attitudes towards the death penalty were such that he could not make the guilt determination solely upon the law and the evidence, he should, of course, be excluded for cause. Otherwise, persons who strongly believe in the

death penalty as well as those who adamantly oppose it should be permitted to join those of their fellow citizens with milder views on such subject in forming a true cross section of the community—the appropriate type of jury to pass upon the guilt or innocence of one accused.

The dissent in the Eighth Circuit's decision in *Grigsby* appears to be based in part upon similar misperceptions of the thrust of the petitioners' arguments. In that dissent it is stated:

What *Grigsby* wants is not an impartial jury but a jury biased in favor of acquitting the guilty for whatever reasons might be advanced.

637 F2d at 532. Elsewhere in the *Grigsby* dissent, it is noted that *Witherspoon* "did not involve the right of the prosecution to challenge for cause the prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at 530 (quoting *Witherspoon*, 391 U.S. at 513, 88 S.Ct. at 1772). The dissenting opinion then states that "in the present case there are precisely the type of jurors whose exclusion *Grigsby* objects to." *Id.* at 530. But petitioners in no way argue that such persons should not be excluded. None of the excluded jurors was asked if his strong feelings against the death penalty would "prevent him from making an impartial decision as to the defendant's guilt." Elsewhere in the dissent, it is observed.

To contend that a juror holding positive views on the validity of the death penalty would vote to find an innocent defendant guilty is absurd.

Id. at 531-32. Precisely. But is it not equally absurd to contend that a non-nullifier juror holding strong negative views toward the validity of the death penalty would vote to find a guilty defendant innocent, assuming that the person was to have no role in assessing the punishment? It in no way follows that people who have strong feelings against the death penalty do not wish to see persons guilty of capital crimes convicted and punished.¹³ Indeed it is assumed and accepted that both such persons, although from opposite ends of the spectrum with respect to their death penalty attitudes, have stated on *voir dire* that they will—and both have taken an oath to—base their decision upon the evidence presented and the law given to them by the court. Indeed petitioners contend that both such persons would be qualified to sit as jurors for *guilt determination*, whereas they recognize that *neither* will be qualified to assess punishment where death is a lawful alternative that must be considered.

V. State's Justification of Challenged Practice.

13. This is, of course, separate and apart from the question of the degree of proof which might be necessary to convince one or the other of the guilt of the accused. See discussion of "guilt-proneness" *supra*. The empirical data and studies discussed above should remove any concern or doubt that non-nullifiers WEs will never vote to convict or even that they will usually vote to acquit.

[15] The petitioners having demonstrated infringements of their Sixth Amendment and due process rights, "There is no need to show particularized bias . . . The only remaining question whether there is adequate justification for this infringement." *Duren v. Missouri*, 439 U.S. 357, 368 n. 26, 99 S.Ct. 664, 670 n. 26, 58 L.Ed.2d 579 (1979). And *Duren* makes it clear that the burden of justification rests on the state. Furthermore, the burden imposed upon the state is a heavy one: the petitioners' rights to a proper jury "cannot be overcome on merely rational grounds." *Taylor v. Louisiana*, 419 U.S. 522, 534, 95 S.Ct. 692, 699, 42 L.Ed.2d 690 (1975).

The Court finds and concludes that most of the State's legitimate interest can be accommodated by requiring completely bifurcated trials in capital cases—with one jury to determine the guilt innocence of the defendant and another jury to determine the penalty if the defendant is convicted. The Court makes this determination before discussing the State's justification of its death-qualification procedures so that the merits of the State's justification arguments can be measured against this least intrusive alternative procedure.

And, before assessing the state's justification arguments, it is also very important to identify more clearly the state's interests by examining the development of the Arkansas juror challenge law as it relates to death qualification in capital cases.

[16] Arkansas statutes have for more than a century consistently provided that a challenge for implied bias may be made, and prospective jurors struck for cause, "[w]hen the offense is punishable with death, the entertaining of such conscientious opinions as would preclude him from finding the defendant guilty." Ark. Stat. Ann. § 43-1920. (emphasis supplied) By its very terms, the current statute, like its predecessors, allows exclusion of "nullifiers" only. In other words, the exclusion of a prospective juror is allowed only where his opinions, whatever they may be, preclude him from being able to fairly judge the guilt or innocence of the defendant. These "exclusion" statutes never sanctioned the removal for cause of those jurors who could not impose the death penalty, but who could, nevertheless, fairly and impartially pass upon the question of the defendant's guilt or innocence in accordance with the law and the evidence. This was made clear in the case of *Atkins v. State*, 16 Ark. 568 (1855) as follows:

It appears that a *venire facias* was issued for thirty-eight jurors, and a list of persons summoned duly served upon the prisoner. When the jurors were called to the bar for the purpose of making up the jury, it seems that the court propounded the following interrogatories to four of the regular panel: "Do you entertain any opinion, which would preclude you from finding a prisoner guilty, where the punishment is death, if the evidence *would justify the verdict, or in other words, are you opposed to capital punishment?"

And they severally answered "that they were opposed to capital punishment."

Whereupon, the counsel for the prisoner moved the court to limit the enquiry, and ask the jurors the questions in these or similar words: "Are your opinions such as to preclude you from finding any defendant guilty of an offense punishable with death?"

Which motion the court overruled, and decided that if a juror answered that "*he was opposed to capital punishment, he was incompetent and disqualified as a juror, and the defendant excepted.*" The 158th sec., chap. 52, Dig., declares that "persons whose opinions are such as to preclude them from finding any defendant guilty of any offense punishable with death, shall not be allowed or compelled to serve as jurors on the trial of an indictment for any offense punishable with death."

The court surely erred in rejecting the jurors, because they were opposed to capital punishment, *unless they had gone further and brought themselves within the disqualification prescribed by the statute.*

Whatever may be a man's views of capital punishment as a question of policy, the jury box is not the proper place for him to consider such policy. There he is obliged, by his oath, to try the guilt or innocence of the accused, according to law and

evidence, and not to set up his own private opinion against the policy of the law, which he is bound, as a good citizen, to abide by and administer, so long as it is in force, and until it is repealed by the constituted authority. See the authorities collected on this subject in *Wharton's Crim. Law* 857, 858.

Id. at 579-80. (last emphasis only supplied.)

It is noteworthy that the United States Supreme Court cited the *Atkin* case in *Witherspoon* for the proposition that an irrevocably held opinion against the death penalty would not necessarily disqualify a juror from service if he could still abide by his oath:

It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State. See *Commonwealth v. Webster*, 59 Mass. 295, 298. See also *Atkins v. State*, 16 Ark. 568, 580

Witherspoon, 391 U.S. at 514 n. 7, 88 S.Ct. at 1773 n. 7. So, over 100 years before *Witherspoon*, the Arkansas Supreme Court ruled precisely as petitioners wish it would rule today, to wit: that opposition to the death penalty, regardless of the strength or degree of that opposition, is not alone a sufficient basis for excluding a person from the trial of the guilt-innocence of a person

charged with a capital crime. *Atkins* hold that only if one's attitude "would preclude him from finding the defendant *guilty*, may such a person be excluded? If the *Atkins* rule were the Arkansas law today these habeas cases would not be before a federal court because petitioners would have won their point in the State Courts. When and how did the Arkansas law change?

The cases following *Atkins* likewise show that the emphasis continued to be placed on whether conscientious scruples would preclude a juror from rendering a verdict on guilt or innocence.

The ninth and tenth grounds of motion for new trial were not well taken. The defendant is charged with a capital offense. Sections 1505-6 Mansfield Digest. This being true, it was altogether proper for the prosecuting attorney to ask the jurymen on their *voir dire* if they had any conscientious scruples *that would preclude them from returning a verdict of guilty* when the law and evidence would justify the same; and, on their answering the question in the affirmative, it was not error in the court to excuse them.

Jones v. State, 58 Ark. 390, 397, 24 S.W. 1073, 1075 (1894) (emphasis supplied).

Of course, under former Arkansas practice the jury returned only one verdict which resolved the issue of guilt and, if the defendant was convicted, fixed the penalty. The guilt-innocence phase and the separate penalty phase is of rather recent vintage. Since the

same jury passed upon both issues at the same time the focus became blurred. Note the language in *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915).

The court permitted the State, over the objection of appellant, to ask the jurors, on their *voir dire*, if they had such scruples against capital punishment *as would prevent them from finding the defendant guilty* where their verdict would mean his execution. Upon the jurors answering in the affirmative the court sustained the State's challenges for cause.

Under the law, as we construe it, capital punishment has not been abolished, and it still being within the province of trial juries to return a verdict that would result in capital punishment, *the State, in the trial of cases where the death penalty may be imposed, is entitled to a jury that has no conscientious scruples as to such penalty.*

Id. at 542-43, 180 S.W. 186, 191-92 (emphasis supplied.) Here the court is still insisting on the proper statutory challenge ("scruples . . . as would prevent them from finding the defendant *guilty*") while going on to state that the State, in the trial of cases where the death penalty may be imposed, "is entitled to a jury that has no conscientious scruples as to such penalty."

And yet, the Arkansas Supreme Court continued to require the *statutory* challenge language. In *Williams v. State*, 186 Ark. 738, 55 S.W.2d 928, the Court stated:

We understand this assignment refers to the questions asked prospective jurors on their *voir dire* concerning any conscientious scruples *they might have in returning a verdict of guilty* where the punishment is fixed by law at death if the facts justified such a verdict. We understand further that the objections made go to the form of the questions only. The form of the questions objected to varied somewhat in wording, but substantially they were all the same. For instance, one juror was asked this question: "have you any conscientious scruples against *returning a verdict of guilty* where the punishment is fixed at death if the facts justify returning a verdict of that sort?" Another was asked: "Have you any conscientious scruples against *voting for a verdict of guilty* where the law fixes the punishment at death?" Substantially all the questions were the same. It is well settled in this State that there is no error in permitting the prosecuting attorney to ask prospective jurors such questions.

Id. at 738-39, 55 S.W.2d 928 (emphasis added). Therefore, until shortly before *Witherspoon* in 1968, Arkansas law appears to have required a more favorable situation for the trial of a defendant accused of capital crimes than even that for which they argue here. Before the 1960s, if a person's views on capital punishment would not affect his ability to try the issue of the defendant's *guilt* he could not be challenged for cause, and, once seated, he would automatically vote on the sentence, even though his convictions concern-

ing the death penalty might be such that he could never under any circumstances impose it. The petitioners here do not contend such a person should sit on the penalty jury, as such a person apparently could, and did, before *Witherspoon*.

As stated above, at the time these cases were tried, Arkansas followed a "single verdict" procedure in capital cases which did not allow for separate hearing with respect to the guilt and the sentencing of the defendant. *Maxwell v. Bishop*, 398 F.2d 138, 150-51 (8th Cir. 1968), revd. 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed. 2d 221 (1970). It was not until 1973 that the Arkansas Legislature created what the Arkansas Supreme Court found to be a constitutionally acceptable bifurcated procedure in capital cases. *Collins v. State*, 259 Ark. 8, 12-13, 531 S.W.2d 13, 15 (1975). It appears that when the Arkansas Circuit Court tried the *Maxwell* case in 1962 that the transition from judicial focus on the effect of conscientious scruples on an impartial determination of *guilt* to judicial focus on the existence of those scruples themselves as a *per se* reason to exclude any prospective juror in a capital case appeared to be complete. The United States Supreme Court found that at least one juror in the *Maxwell* case had been excused solely for an affirmative answer to the question: "Do you entertain any conscientious scruples about imposing the death penalty?" *Maxwell*, 398 U.S. at 264, 90 S.Ct. at 1580. *Maxwell* was returned to the district court to evaluate this *voir dire* in light of *Witherspoon*.

Between the time *Witherspoon* had been decided in 1968 and the United States Supreme Court's decision in *Maxwell* in 1970 there remains no doubt that the Arkansas Supreme Court had decided to no longer adhere to the limitation on exclusion of jurors as provided by the statute. Instead it decided that if a juror could never vote to impose the death penalty, he could be excluded altogether. No inquiry apparently had to be made as to whether the juror was nevertheless capable of rendering a fair and impartial verdict upon the guilt or innocence of the defendant. The case of *Davis v. State*, 246 Ark. 838, 440 S.W.2d 244 (1969), decided about one year following *Witherspoon*, clearly shows the change in focus. Not only did the Arkansas Supreme Court allow the exclusion of jurors opposed to the death penalty, but it relied for its reasoning on the language in the *Atkins* case, the very case in which it was held such jurors could *not* be excluded on that basis alone. In the words of the Court:

Appellant contends here that the trial court erred under the holding in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), in including jurors who had conscientious scruples against capital punishment. A subsidiary argument is that the trial court insured the prosecution's request for a conviction and death sentence by excluding all prospective jurors who said they opposed the death sentence or had religious or conscientious scruples against the death penalty. We do not believe that the record sustains appellant's argument.

As we read the record, the trial court followed the *Witherspoon* case, excluding Justice Douglas's concurrence, and our own case of *Atkin v. State*, 16 Ark. 568 (1855). In the latter case we pointed out:

"Whatever may be a man's view of capital punishment as a question of policy, the jury box is not a proper place for him to consider such policy. There he is obliged, by his oath, to try the guilt or innocence of the accused, according to law and evidence, and not to set up his own private opinion against the policy of the law, which he is bound, as a good citizen, to abide by and administer, so long as it is in force, and until it is repealed by the constituted authority. See the authorities collected on this subject in Wharton's Crim.Law 857, 858."

To follow appellant's argument to its logical conclusion would create a kind of anarchy in our system of government whereby the minority will always hold a veto over any established public policy. For instance, since the holding in *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), it would be almost impossible to enforce some provisions of the 1964 Civil Rights Act, if a court were forced to accept jurors whose private opinions are contrary to the policy of the law. For these reasons we find this point without merit.

Davis, 246 Ark. at 541-42, 440 S.W.2d at 247.

In *Davis* there is no mention of the statute authorizing exclusion: nor is it stated, as was always emphasized in the earlier cases, that scruples against the death penalty must be such as will preclude the juror in question from rendering an impartial verdict on the defendant's guilt. In fact, after *Davis*, the Arkansas Supreme Court appears to have abandoned its reliance on the statute concerning the issue of exclusion for death penalty scruples and, instead, exclusively relied upon *Witherspoon* (which ostensibly enlarge the rights of defendant) to enlarge the right of the state to exclude jurors. See *Neal v. Tate*, 259 Ark. 27, 31, 531 S.W.2d 17, 21 (1975), *O'Neal v. State*, 253 Ark. 574, 577, 487 S.W.2d 618, 621 (1972), *Montgomery v. State*, 251 Ark., 645, 649, 473 S.W.2d 885, 888-89 (1971).

By 1976 the Arkansas Supreme Court had progressed beyond simply reiterating the *Witherspoon* rule in striking down challenges to the practice of excusing those excludable under *Witherspoon*. Instead the court advanced the additional rationale that, while there may be some truth to the proposition that the jurors remaining after *Witherspoon* excludables were removed were more likely to convict, nevertheless, in Arkansas' bifurcated capital procedure the same jurors ruled on both guilt and sentencing and a nullification of the imposition of the death penalty would occur if *Witherspoon* excludables were not removed from the entire procedure. *Venable v. State*, 260 Ark. 201,

205-06, 538 S.W.2d 286, 289-90 (1976). See also *Giles v. State*, 261, Ark. 413, 425-26, 549 S.W.2d 479, 486 (1977).

The bottom line of this analysis is that prior to *Witherspoon*, Arkansas focused on the most traditional and accepted of *voir dire* inquiries: whether a prospective juror's scruples would preclude him from rendering a verdict of guilty and the court relied directly on the legislatively mandated language. After *Witherspoon*, the court no longer relied on the exclusion statute but simply adopted *Witherspoon* as the predicate for a judicially established Arkansas rule that allowed the exclusion of prospective jurors from the guilt-innocence phase on the ground that they could never impose the death penalty if called upon to assess a penalty. Although it was argued that Arkansas had a bifurcated capital procedure and *Witherspoon* excludables should be allowed to sit for the guilt phase of that procedure, the court has held that the statute allows for but one jury for both phases and, therefore, if jurors can be excluded under *Witherspoon* at the sentencing phase by constitutional rule, then they are automatically bumped out at the guilt phase. The Arkansas Supreme Court in so ruling made no effort to deal with the apparent conflict between Section 43-1920 and its own judicially developed for-cause challenge in the light of the vital interests of capital defendants in a trial of their guilt or innocence by an impartial and representative jury. Confronted with a state policy reflected by Section 43-1920 which would prevent exclusion at the guilt phase of any prospective juror whose conscientious opinions would not preclude him from finding a

defendant in a capital case "guilty," see *Atkins*, and another state policy that required that both the guilt and penalty phases be tried by the same jury, they opted to give priority to the latter state interest and, to further implement that policy, by creating a new challenge for cause that had never existed before and was contrary to the earlier Arkansas law. The Court could have said that Section 43-1920 controlled and that it would not depart from *Atkins*. This would have given the state the option of not death qualifying capital juries or of going back to the legislature with a request for a truly bifurcated trial in capital cases—one jury to determine guilt or innocence and another jury, if the defendant were convicted, to assess the penalty. And, of course, if the legislature created that model then not only its legitimate interest in death qualifying jurors at the penalty phase but also its vital interest in a fair trial for capital defendants, as reflected in Section 43-1920, could have been fully and consistently protected. It is certainly not fair to argue that the State of Arkansas has a lesser interest in fair trials of the issue of guilt-innocence of persons accused of capital crimes than it has in any possible financial savings that might accrue from having the same jury handle both phases of capital trials.

No criticism can, of course, be made of a judicially created rule that would say that no person adamantly opposed to the death penalty will be permitted to sit on a jury whose mission it is to determine, under standards prescribed by the legislature, whether to impose the penalty of death or the penalty of life imprisonment. Indeed such a rule would be parallel to,

and consistent with, section 43-1920 since the rationale of each is that no one shall be permitted to sit on a jury in a situation in which he cannot in good conscience swear to impartially try the issue presented (the guilt-innocence in the one case and the penalty in the other) solely upon the basis of law and the evidence. The problem occurs when the proper penalty phase challenge is permitted to be the basis for excluding people from the guilt-innocence phase who can, and will swear to, try such issue impartially and solely upon the basis of the law and the evidence.

The State has also argued, and the Court has accepted, that, under current Arkansas practice, those persons who have been classified as ADPs (Automatic Death Penalty) may be challenged for cause just like WEs (*Witherspoon* excludables). Transcripts of state *voir dire* assertedly reveal and confirm that practice. If this is true such challenges are not based upon any Arkansas statute, and it must also be true the judicial acceptance thereof is, like challenges of those who are adamantly opposed to the death penalty, a thing of recent origin. See *Needham v. State*, 215 Ark. 935, 939-40, 224 S.W. 785, 787 (1949) which would suggest that at least until very recent times, the Arkansas law would not recognize such challenges:

The defense counsel sought to ask a prospective juror if he would feel obligated to impose the death penalty rather than life imprisonment upon a finding of guilty. *There was no prejudicial error in the trial court's refusal to allow this inquiry.* Appellant argues that this question was merely the converse

of the State's inquiry as to conscientious scruples, but we are unable to agree. The trial court has no discretion in permitting the State's inquiry, for the statute expressly recognizes such scruples as a cause for challenge. *There is no corresponding statutory recognition of implied bias in favor of capital punishment; so the matter rests within the trial court's discretion.* We have pointed out that the possible causes of bias are infinite. *Pierce v. Sicard*, 176 Ark. 511, 3 S.W.2d 337. It is for this reason that the trial court is necessarily given a broad discretion in controlling the examination of veniremen. Here the trial court stated that he did not think the juror could give a definite answer to the question without knowing all the evidence to be presented. In the absence of anything in the juror's earlier interrogation to indicate that he had a marked predilection for capital punishment we have no basis for finding an abuse of discretion.

(emphasis supplied)

It is somewhat ironic to realize that the Arkansas law which the petitioners now challenge apparently had if not its origins then its rationalization in the 1968 decision of the Supreme Court in *Witherspoon*. Since that decision held the states would be permitted to exclude those who adamantly opposed the death penalty *if they should choose to do so*, the Arkansas Supreme Court apparently decided to create challenges for cause that purpose without the benefit of any explicit legislative policy statement to that effect. Of course, as pointed out above, such challenges for cause

at the *penalty phase* would be entirely in keeping with the traditional challenges created by both legislatures and the courts because it is fundamental that no one should sit on a jury who cannot, and who therefore cannot swear to, try the issue presented (here the penalty to be assessed) in accordance with the law and the evidence. But by permitting such a challenge of a prospective juror who was to try the guilt-innocence of the defendant, the Arkansas Supreme Court had to depart from the Arkansas Statute (Section 43-1920), and its own prior rulings *see Atkins*, *supra*, leaving the present Arkansas law 180° out of phase therewith.

So we are not dealing here with ancient and traditionally accepted applications of venerable rules of state practices. To the contrary, we are here dealing with state rules developed judicially in recent years mostly in response to a U.S. Supreme Court decision (*Witherspoon*), which have dramatically changed those rules from what they were for almost a century and a half. Although petitioners would obviously like to return to the pre-*Witherspoon* Arkansas standards entirely, they only argue here to return to the situation where people will not be excluded *at the trial of their guilt-innocence* on the basis of their death penalty views. They concede that Arkansas may stay with its newly developed rule which permits the exclusion of those adamantly opposed to the death penalty *at the penalty phase* of capital trials.

Does the State have any interest in preserving its death qualification procedures that can justify the use of the resulting biased juries for guilt determination purposes?

The following accepted propositions are repeated for the purpose of this analysis:

1. The petitioners here concede that the State has the right to death-qualified jurors who will participate *in the penalty phase* of the trial. Therefore, the State's interest in vindicating its policy concerning capital punishment by obtaining a capital sentence in any appropriate case is not challenged.

2. The petitioners concede that the State has the right to exclude at the guilt determination phase of the trial all prospective jurors who make "unmistakably clear . . . that their attitude toward the death penalty would prevent them from reaching an impartial decision as to the defendant's *guilt*." *Witherspoon*, 391 U.S. at 522-23 n. 21, 88 S.Ct. at 1776-77 n. 21. It follows that the State's interest in a fair trial of the issue of guilt or innocence is not in any way challenged in this lawsuit.

What the petitioners are seeking is a ruling by this Court that they are entitled to a fair trial before an impartial jury with respect to their guilt or innocence. To accomplish this, they ask this Court to prohibit the exclusion at the *guilt determination phase* of the prospective jurors whose sole asserted disqualification consists of their inability to vote for the death penalty *at the penalty phase of the trial*.

Since the State's interest in removing jurors who are adamantly opposed to the death penalty at the penalty phase of the trial is recognized, and since the

State's interest in removing any jurors who are for any reason unable to make a determination of the guilt or innocence of the defendant solely upon the basis of the law or the evidence, it follows that the State's principal interest in preserving death qualification or the death qualification process boils down to a question of efficiency and money. The State simply does not want to pay the expense of having two separate juries, one to determine guilt and the other, if necessary, to determine penalty.

If such a bifurcated system were established, would it mean that in every case in which the State sought the death penalty two separate juries would have to be impaneled? The answer is, obviously, no. To require the impanelment of the second jury, the guilt phase jury would have to end with the conviction of the defendant, in accordance with the statutory requirements, of capital murder (not a conviction on a lesser included offense, e.g., first degree murder); it would have to reject any insanity claim; and, finally, the State would have to continue to seek the death penalty and to insist upon its consideration by a fully death-qualified jury. It is interesting to note that in the *Grigsby* case, no death-qualified jury would have been required at the penalty phase because, after obtaining the conviction of capital murder, the State decided to waive the death penalty.

The point is that a bifurcated procedure would impose upon the State some additional expense if the results of the guilt determination phase of the capital trial so warranted. But capital trials themselves comprise a miniscule percentage of all criminal trials.

In those cases where a separate, death-qualified jury would be required at the penalty phase, the State would bear the cost of the additional jurors. There would be a second *voir dire*. It is likely that some portion of the evidence introduced during the guilt-determination trial would have to be re-introduced. Procedures could be developed so that the penalty-phase jury could be impaneled promptly after the conclusion of the guilt-determination trial so that witnesses would not become unavailable or other evidence lost. All of the actors in the drama would be the same except the jurors, so no significant additional preparation time would be required.

Respondent notes that Arkansas' present procedure can work to the detriment of the state: "... if a court vacates only a death sentence but affirms a conviction, the State is precluded from retrying only the penalty phase of the trial to a new jury. It faces the choice of completely retrying the defendant through both the guilt and penalty phases or foregoing the attempt to again impose the death penalty." Respondent's Reply Brief p. 38. This result is said to follow from the present requirement of Ark.Stat.Ann. Section 41-1301(3) which mandates that both phases be tried to the same jury. The Respondent then notes a possible benefit to the State should true bifurcation be required:

"If the courts mandate separate juries . . . the State could also use that holding to its advantage in attempting more efficiently to reimpose a vacated death penalty."

Respondent's Reply Brief p. 38.

The respondent State of Arkansas introduced no evidence to establish the burden in dollars which the bifurcated trial procedure would impose upon it. But it is clear to the Court, in the context of the overall criminal justice system of the State, that said cost would be relatively small. Indeed, there is some merit to petitioner's argument that the bifurcated process might not cost the State more than the existing procedure. Using the existing procedure, the death-qualification process now occurs in every trial in which the State seeks the death penalty. State prosecutors testified at the trial that the death-qualification process often takes up as much time as the trial itself. On the other hand, it is clear that penalty trials do not occur in all cases that begin as capital cases. (Mr. Grigsby's case is an example). If the death-qualification process is eliminated from the guilt-determination phase, it may not be needed at all. One thing is certain: the guilt-determination phase of the trial would be much shorter and much more clearly focused upon the true issue—the guilt or innocence of the accused.

It is a rare situation when the United States Supreme Court permits financial considerations to take priority over constitutional rights. To deserve such priority, the asserted interests of the State must be substantial. This view was succinctly addressed in *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), which involved a challenge to Georgia's procedure of trying misdemeanor cases to a five-person jury. The case arose in the wake of *Williams*

v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), which had upheld the use of six-person juries in non-capital criminal trials. The State in *Ballew* argued that financial consideration had played a role in the Supreme Court's *Williams* decision and that if such considerations could justify a reduction in the requisite size of the jury from twelve to six, the marginal cost savings achieved by a reduction from six to five jurors would likewise justify the existence of the Georgia procedure. The Supreme Court was unpersuaded. It acknowledged that "substantial" financial benefits might inure to the states from the reduction of juries from twelve to six members. The Court found, however, that "a reduction in size from six to five or four or even three would save the states little." *Id.*, 435 U.S. at 244, 98 S.Ct. at 1041. Cost savings alone, the Court concluded, could not justify the resulting prejudicial effects on the rights of the accused misdemeanants.

[17, 18] Two important lessons may be gleaned from the Court's analysis in *Ballew*. First, that financial savings must be substantial before they can begin to justify the creation of procedural rules that violate the constitutional rights of an accused. Second, that a court may disregard a state's financial savings argument even when applied to persons accused of committing mere misdemeanors. If the financial considerations fail to outweigh the constitutional interests of those who face light terms of imprisonment or fines, it would surely follow that financial considerations can very seldom if ever outweigh the interests of those facing heavy penalties. When, as

here, we are dealing literally with life and death, the cost-savings arguments of the state simply lose all force.

As stated in *Gardner v. Florida*, 430 U.S. 349, 360, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977):

[I]f the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death.

And as stated in *Reid v. Covert*, 354 U.S. 1, 77, 77 S.Ct. 1222, 1261, 1 L.Ed.2d 1148 (1956):

. . . [Capital] cases . . . stand on quite a different footing than other offenses. In demands for . . . procedural fairness . . . I do not concede that whatever process is "due" an offender faced with a fine or prison sentence necessarily satisfied the requirements of the Constitution in a capital case. The distinction is by no means novel [citation omitted]; nor is it negligible, being literally that between life and death.

See also *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976); *Lockett v. Ohio*, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978); and *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d. 944 (1976).

The Court finds and concludes that the State's interests in using the present death-qualification

system in capital cases cannot justify its effect on guilt determinations in capital cases. Nor can such interests justify the destruction of the representativeness of the juries which result from death qualification. In sum the respondent has failed to carry its burden of justifying the use of nonrepresentative and partial juries in the trial of the guilt or innocence of those accused of capital crimes.

VI. Conclusion.

The Constitution does not prohibit the death penalty in all cases. Death may be the punishment for certain crimes (if not imposed upon a mandatory basis) so long as the procedures used in imposing that penalty meet constitutional standards. One of those procedures—jury selection in capital cases—has been the subject of great attention by the courts since *Witherspoon* was decided in 1968. Those procedures and the composition of the juries they produce have also been subjected to rigorous study by psychologists and social scientists.

The U.S. Supreme Court, in leaving the critical "life and death" decisions in these cases to juries, has assumed that capital juries reflect the conscience and the standards of decency of the community when they make such decisions. If this assumption is shown to be invalid then the whole rationale fails. In *Witherspoon* the Supreme Court recognized that this assumption would not hold true if the state were permitted to remove from the penalty-determination phase all persons who had scruples of any kind against the death penalty.

Before a person may be subjected to the possibility of the death penalty he necessarily must be convicted of a capital crime. In this guilt-innocence determination phase of his trial a defendant charged with capital punishment should be, and is entitled to a fair and impartial jury and he is also entitled to a jury composed of a fair cross-section of the community, a jury which will represent and reflect the conscience of that community. The evidence introduced here makes it abundantly clear that juries death-qualified under *Witherspoon* standards are not as representative of the community as they could, and should, be, and, therefore, do not serve the objective of interposing between the state and the defendant the conscience and broad collective wisdom of that community. It is also clear that such juries cannot be considered fair and impartial with respect to the issue of the guilt-innocence of defendants in capital cases.

The phrase "fireside induction" has been used to refer to "those common sense empirical generalizations about human behavior which derive from introspection, anecdotal evidence, and culturally transmitted beliefs."¹⁴ Dr. Robert M. Berry's article "Fireside Induction," *see supra*, states that the "fireside induction suggests that in equivocal or ambiguous cases jurors who favor the death penalty are more likely to vote for conviction whereas jurors who oppose the

14. Meehl, *Law and Fireside Inductions: Some Reflections of a Clinical Psychologist*, in *Law Justice and the Individual in Society* (J. Tapp & F. Levine Eds. 1977).

death penalty are more likely to vote for acquittal." He goes on to say: "Broadly stated, the fireside induction suggests that proponents of the death penalty are conviction-prone and opponents of the death penalty are acquittal-prone." *Id.* at 6.

Dr. Berry states, and the Court agrees, that both defense attorneys and prosecutors accept this induction as a proposition which "everyone knows," even though prosecutors have argued that their views are to the contrary. He is convinced that "the prosecution shares the view of the fireside induction held by the defense." *Id.* at 7. The evidence and the discussion above support his opinion.

Dr. Berry observed that the law usually reflects these fireside inductions which may or may not accord with empirical behavioral science studies and principles. To him the current death-qualification practices, predicated on *Witherspoon* standards, represent an instance where the fireside induction, held and accepted by most active participants in the trial milieu, has not been accepted and is not presently reflected in the law. Tension develops because the verbal rationalizations and justifications for those practices are at odds with our intuitive feelings and judgments as to the real truth of the matter.

But the Court suggests the "gut" judgments of trial lawyers and judges as to the fairness of *voir dire* procedures, and as to the necessity therefor, are not just intuitive generalizations about human experience

but also represent a reflection of the training and experience of such persons over time in the courtrooms of this nation. After one has conducted or observed hundreds of *voir dire* examinations and has read endless pages of transcripts of the death qualification process he should be able to form a judgment as to whether such procedures are fair or whether they tend to prejudice one or the other party. Likewise he should be able to ask and answer if there be any good reason to justify the exclusion of a prospective juror and if that exclusion prejudices or benefits one or the other party. This is simply: law work.

Here the fireside inductions clearly support the contentions of petitioners. If asked, "does the removal of all prospective jurors with adamant objections to the death penalty result in a jury more prone to convict?" Trial lawyers and judges will answer, "yes, of course." If asked, "does the usual process of death qualification itself, as observed time and time again, prejudice the defendant? The answer, "yes, clearly."

Yet it is always possible that our dearly held "fireside induction" may be proved to have been in error, to be nothing more than professional superstition. And the U.S. Supreme Court in *Witherspoon* itself counsels against embracing *per se* rules based upon judicial notice or intuition without the benefit of empirical studies.

The research has been done. The studies have been introduced into evidence and explained. What do they show? They prove that what we "knew" all along is in

fact true. The trial lawyers and judges could have been wrong but in this case at least they were right.

The evidence supports, and the Court agrees with, the following conclusions reached by Dr. Berry in his article:

When the other survey evidence is considered, the clear thrust of the evidence has been to establish that persons who favor the death penalty are "uncommonly" predisposed to find for the prosecution and against the defendant.

All of the studies and all of the surveys display a common element: they demonstrate that there is a significant difference between those potential jurors excludable under *Witherspoon* and those jurors who could be "death-qualified" under *Witherspoon*. That is, all of the studies uniformly supported the fireside induction. Under these conditions, Meehl noted that:

The legislator's, judge's or administrator's situation is most comfortable when there is a sizable and consistent body of research, experimental and nonexperimental (file data and field observation data), yielding about the same results as the fireside inductions. While one may be scientifically skeptical even in this harmonious situation, in the pragmatic context of decision making, rule writing, or policy adopting, such rigorous skepticism can hardly lead to pragmatic vacillation. Some sort of

action is required, and all we have goes in the same direction.

The appropriate action would seem to require the conclusion that death-qualified juries are not only "uncommonly," but also unconstitutionally, prone to convict. A constitutional decision will, of course, have to meet the constitutional standard, which requires that the WE group constitute a distinctive, identifiable group. It is obvious, however, that the WE group is distinctive and identifiable, since members of this group are currently excluded on the basis of their distinctive and identifiable attitudes toward the death penalty. The convergent conclusion from the fireside induction and from social science research is that the exclusion is not irrelevant, but basic to fair and impartial judgments of guilt or innocence.

The appearance of a neutral jury is achieved by eliminating both the ADP group and the WE group. In reality, jury neutrality is not achieved, however, and the inadequacy is more than a matter of the unequal distribution of ADPs and WEs. Haney has discussed the range of possible solutions to the multiple problems introduced by death qualification and has concluded that even modified forms of death qualification would violate the constitutional requirements of a fair and impartial trial. Haney's thoughtful analysis suggests that the most reasonable solution is a bifurcated trial with death-penalty attitude forming a basis for

exclusion only at the penalty phase. In many jurisdictions, bifurcated trials already occur in civil cases with one jury assessing liability and another deciding damages. This practice is especially likely to be observed as the importance of the case increases, although no such case even begins to approach the life or death seriousness of capital cases involving death qualification.

Paraphrasing *Adams v. Texas* this Court now holds that if prospective jurors in capital cases are barred over the defendant's objection from jury service because of their views on capital punishment on any broader basis than inability to follow the law or to abide by their oaths, the guilty verdict must be set aside. The evidence and the records show that prospective jurors in Mr. Grigsby's case and Mr. McCree's case were so barred from jury service over the specific objection of each.

The Eighth Circuit asked the Court to factually determine:

(a) Whether prospective jurors in these habeas cases were disqualified for their death penalty views. The answer is, "yes."

(b) Whether the resulting death-qualified juries were more prone to convict petitioners than would be non-death qualified juries. The answer is, "yes."

If the answers were "yes" to these questions, the Eighth Circuit asked this Court to then determine the

appropriate remedy. Both legal precedents and logic make the answer clear: Convictions so obtained must be set aside with new trials permitted if desired by the State.

Where the defendant's right to a representative jury under the Sixth Amendment is violated his conviction must be set aside. *Duren v. Missouri*, *supra*. No harmless error analysis is permitted because the very integrity of the fact finding function of the jury is directly implicated. See *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The result in *Witherspoon* (not a Sixth Amendment case) provides no support for a contrary view. There the Court found the penalty phase contaminated by the then existing Illinois death qualification procedures. At that time it felt it could not determine on the basis of the record before it whether that practice also contaminated the guilt-innocence phase of the trial. So it simply set aside the death penalty while leaving the conviction intact. Now, however, upon a completely different evidentiary record this Court has found and concluded that, through the death qualification practices permitted by the State of Arkansas in the guilt-determination phase of capital trials, petitioners were denied their right to a neutral jury and to a representative jury. If the U.S. Supreme Court had reached similar conclusion in *Witherspoon* can there be any doubt as to the remedy it would have required?

Mr. Hulsey has been denied the right to raise these "Grigsby issues" because of his failure to object to the challenged procedures as required in State court. And

Mr. Grigsby is now deceased. The Court will therefore set aside the conviction of Mr. McCree only and direct the respondent within 90 days, to retry him or to set him free.

OPPOSITION

BRIEF

No. 84-1865

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1984

A. L. LOCKHART, Director,
Arkansas Department of Correction,

Petitioner,

-against-

ARDIA V. MCCREE,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

MEMORANDUM OF RESPONDENT MCCREE
IN RESPONSE TO PETITION FOR CERTIORARI

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EDITOR'S NOTE

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WILL BE ISSUED.

QUESTION PRESENTED

Whether the jury trial guarantee of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment prohibit the systematic exclusion for cause from a capital defendant's guilt or innocence trial of all jurors who could fairly and impartially try that issue -- solely because their opposition to the death penalty would make them ineligible for service in the event of a subsequent penalty trial -- in light of extensive and uncontradicted proof that this practice produces guilt-phase juries that are (i) unrepresentative of the communities from which they are drawn and (ii) unduly prone to convict?

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	1
ARGUMENT	1
The Judgment Of The Court Of Appeals Is Amply Supported By The Strong And Convincing Factual Record And Is Consistent With This Court's Constitutional Teachings	1
The Question Presented By This Case	2
The Questions <u>Not</u> Presented By This Case	3
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Adams v. Texas, 448 U.S. 38 (1980)	6
Duren v. Missouri, 439 U.S. 357 (1979)	4
Engle v. Isaac, 456 U.S. 107 (1982).....	7
Movey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301 (1980).....	8
Keeten v. Garrison, No. 84-6187, <u>cert. filed</u> , February 3, 1985	2
McCleskey v. Kemp, No. 84-6011, <u>cert. filed</u> , May 28, 1985	2
Taylor v. Louisiana, 419 U.S. 522 (1975).....	4
Wainwright v. Sykes, 433 U.S. 72 (1977).....	7
Wainwright v. Witt, __U.S.__, 83 L.Ed.2d 841 (1985).....	6
Witherspoon v. Illinois, 391 U.S. 910 (1968).....	3,4,7,8, 9
Witt v. Wainwright, __U.S.__, 84 L.Ed.2d 801 (1985).....	2

No. 84-1865

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MEMORANDUM OF RESPONDENT MCCREE
IN RESPONSE TO PETITION FOR CERTIORARI

Respondent Ardia V. McCree submits this memorandum in response to the petition for certiorari filed by petitioner A. L. Lockhart on May 29, 1985, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in Grigsby v. Mabry, which is officially reported at 758 F.2d 226 (8th Cir. 1985)(en banc).

I

THE JUDGMENT OF THE COURT OF APPEALS
IS AMPLY SUPPORTED BY THE STRONG AND
CONVINCING FACTUAL RECORD AND IS CONSISTENT
WITH THIS COURT'S CONSTITUTIONAL TEACHINGS

The basic issues before the Court in this case are undeniably significant to the administration of criminal justice in a number of states. Although both the petition for certiorari and the brief submitted by amici curiae significantly distort or exaggerate what is at stake, respondent McCree agrees that the

underlying federal questions have long remained unresolved -- awaiting the development of an adequate factual record -- and that the present record now constitutes a solid foundation for the resolution of those questions. With the advent of this full record, it is not surprising that the Court of Appeals expressed its hope that "the Supreme Court will grant a writ of certiorari and resolve the issue," App. A29^{1/} or that several members of the Court have observed that "[t]he Court is certain to grant certiorari in the immediate future to resolve this issue." Witt v. Wainwright, __U.S.__, 84 L.Ed.2d 801 (1985)(Marshall & Brennan, JJ., dissenting from denial of certiorari).

However, respondent McCree submits that the Court of Appeals in this case properly resolved both the factual and the constitutional questions at issue. Since adverse judgments from two other circuits are presently pending in the Court, see Keeten v. Garrison, No. 84-6187, cert. filed, February 2, 1985; McCleskey v. Kemp, No. 84-6811, cert. filed, May 28, 1985, respondent respectfully suggests that certiorari might best be denied on petitioner Lockhart's petition, and certiorari granted instead in either Keeten or McCleskey, or both.

The Question Presented By This Case

The principal question addressed and resolved by the Court of Appeals in Grigsby v. Mabry -- the constitutionality of

^{1/} Each reference to the appendix to the Petition for Certiorari will be indicated by the abbreviation "App.," followed by the number of the page on which the reference may be found. Each reference to the supplemental appendix to the Petition for Certiorari will be indicated by the abbreviation "Supp. App."

"death-qualified" juries as triers of guilt or innocence in capital cases.-- is plainly an important issue of federal law. The Court reserved the question in Witherspoon v. Illinois, 391 U.S. 510, 517 n.11 (1968), because the empirical evidence available in 1968 on the effect of death-qualification was inadequate for a proper resolution of the constitutional issue:

The data adduced by the petitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

Id. at 517-18.

Since 1968, however, extensive empirical research has been undertaken and completed, documenting the effect of death-qualification both on jury composition and on jury performance. The present record includes the full results of that research. These results, as both courts below found, are overwhelmingly one-sided. In the District Court's words:

The research has been done. The studies have been introduced into evidence and explained. What do they show? . . . "[T]he clear thrust of the evidence has been to establish that persons who favor the death penalty are "uncommonly" pre-disposed to find for the prosecution and against the defendant. All of the studies and all of the surveys display a common element: they demonstrate that there is a significant difference between those potential jurors excludable under Witherspoon and those who could

be "death-qualified" under Witherspoon . . . The Eighth Circuit asked the [District] Court to factually determine: . . . (b) Whether . . . death-qualified juries were more prone to convict petitioners than would be non-death qualified juries. The answer is 'yes.'

Supp. App. 128-31 (citations omitted).

Upon its review of the District Court's opinion, the Court of Appeals fully agreed with its factual findings:

In upholding the district court's finding based upon the evidentiary record we must note: (1) the record here is exhaustive; it is difficult to perceive how any petitioner could make a record and an objection to death-qualified juries, as constituting an improper jury for the determination of guilt-innocence, more complete than that presented here; and (2) there are no studies which contradict the studies submitted; in other words, all of the documented studies support the district court's findings.

App. A27.

Relying on this extensive evidentiary foundation, the District Court concluded that death-qualification denies a petitioner his Sixth and Fourteenth Amendment rights to a jury drawn from a representative cross-section of the community, Supp. App. 9, 9-35; see Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979); and also deprives a petitioner of his Sixth and Fourteenth Amendment rights to an impartial and unbiased jury. Id. at 9: 35-81. The Court of Appeals, although agreeing that the evidence amply supported the District Court's findings that death-qualified juries are "conviction-prone," see App. A7, A22-27, chose to rest its constitutional judgment on the adverse effect of death-qualification on a petitioner's Sixth Amendment right to a jury drawn from a representative cross-section of the community, making it "unnecessary to discuss

the [constitutional] issue whether the jury in the petitioners' case was in fact a biased jury." App. A7.

That judgment is now before the Court on certiorari. The Questions Not Presented By This Case

The petition for certiorari and the brief of amici curiae, in their apparent zeal to underline the importance of this case, have suggested a number of questions that in fact are not at issue on this appeal. First, respondent's death-qualification claim does not "require that members of a specific group [Witherspoon-excludable jurors or "WEs"] be seated on petit juries," Petition at 13, ^{2/} or insist "that WEs . . . must be included in the guilt phase of capital murder trials." Id. at 5; see also Amici Brief at 4. Respondent's claim is directed solely against the State of Arkansas' systematic exclusion of all such jurors from every capital trial, for cause, irrespective of their ability to judge guilt or innocence fairly and impartially. Respondent's claim does nothing to restrict the State's exercise of its peremptory challenges; it does not insist that such jurors must ultimately sit on every jury.

As the Court of Appeals observed:

Any implication [that our holding] . . . requires representation of all cognizable groups on each petit jury is misplaced . . . Our holding simply forbids the systematic exclusion of any cognizable group from a petit jury.

App. A10 n.6.

^{2/} Each reference to the Petition for Certiorari in this case will be indicated by the word "Petition," followed by the number of the page on which the reference may be found. Each reference to the Brief of Amici Curiae will be indicated by the words "Amici Brief."

Second, this is not a case that compromises "[t]he State['s] . . . legitimate interest in obtaining jurors who can 'follow their instructions and obey their oaths,' and who 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court.' Petition at 17, quoting Wainwright v. Witt, __U.S.__, 83 L.Ed.2d 841 (1985); see also Amici Brief, 7-9. Respondent concedes, and the Court of Appeals expressly held, that all prospective jurors whose death penalty attitudes would keep them from being fair and impartial may properly be excused for cause:

We agree, and petitioners [McCree, etc.] do not dispute that Arkansas may exclude jurors who will not take the oath and decide guilt-innocence on the basis of the law and evidence presented. But the state cannot assume a juror with scruples regarding the death penalty will violate the oath and refuse to follow the law.

App. A30. If, after the State's searching voir dire, a trial judge is convinced that a "juror's views would 'prevent' or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," see Wainwright v. Witt, supra, 83 L.Ed.2d at 851-52, quoting Adams v. Texas, 448 U.S. 38, 45 (1980), nothing in the opinion of the Court of Appeals below would prevent a successful challenge for cause to that juror. The Eighth Circuit opinion forbids only the excusal for cause of jurors who can fairly and impartially decide the question of guilt or innocence.

Third, a related point, this is not a case in which respondent has demanded the inclusion of "biased jurors," Petition at 20; id. at 23; or the creation of an "acquittal-prone jury." Id. at 23. One need not impute bias to any individual Republican or labor union juror to assert that a jury comprised solely of Republicans or labor union members

might be biased in a particular direction. Respondent's point is not that individual death-qualified jurors are impermissibly biased in favor of the prosecution, or that Witherspoon excludable jurors -- who after all are permitted to sit in every criminal or civil case other than one where life is at stake -- are impermissibly biased in favor of the defense, but that a jury comprised solely of one group, formed by systematically excluding the other, has repeatedly been demonstrated by convincing empirical evidence to be biased as a functioning jury. As the District Court noted:

It cannot be repeated too often: petitioners [McCree, etc.] are simply asking that their guilt or innocence be determined by a jury which is chosen and composed in essentially the same way that juries are selected in over 99 percent of all criminal cases

Supp. App. 95-96.

Fourth, this is not a case requiring the State of Arkansas to empanel "two juries in a capital case," Petition at 19; see also Amici Brief at 4, or to adopt any other predetermined procedure to remedy the constitutional violation identified. The Court of Appeals was in fact careful to "leave the actual procedural remedy to the discretion of the state." App. at A7. Arkansas is free to empanel additional jurors, to have two juries hear the case simultaneously, to move toward judge sentencing, to entrust the jury deliberations to whatever jurors are selected, or to employ any other procedural device that avoids systematic exclusion of Witherspoon-excludable jurors.

Finally, this is plainly not the proper case in which to address the retroactivity of this new rule, Petition at 8; see also Amici Brief at 1 n.1; or the application of procedural bars recognized by Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982) to other cases in which the issue was not raised in compliance with

state procedural requirements.

Petitioner Lockhart and amici curiae suggest incorrectly that each of these questions are before the Court on this appeal. They also make important misstatements about the record that is presented, some of which might bear on the certworthiness of the case. Respondent will here address only those relevant to this Court's exercise of its certiorari jurisdiction. Petitioner repeatedly suggests that "[t]he only level of proof offered by McCree was that of statistical significance," Petition at 22, and that McCree's results reflect merely "the attitudes of laboratory subjects and survey respondents." Id. at 9. The desire to denigrate all social scientific evidence is understandable, since the seventeen-year interval since Witherspoon has seen a host of reputable scientific studies, each supporting respondent McCree's position, with not a single scientifically valid study to the contrary. Yet the criticism is inaccurate even on its own terms, as the Court of Appeals observed below:

Arkansas also contends that the behavior of real jurors cannot be predicted from the studies presented by petitioners. However, some of the studies included real jurors, and one involved a realistic simulation of jury deliberations. The State of California raised the same objection in Hovey [v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301 (1980)] . . . and it was flatly rejected.

App. A24-25. Moreover, the District Court found that "[t]he petitioners in the case at bar have responded to the Supreme Court's invitation with a plethora of well-documented scientific research that does not suffer from the numerous deficiencies attributed to the research in Witherspoon." Supp. App. 42-43. Critiques by the State of Arkansas concerning the validity of these studies and whether they are sufficiently reliable to prove respondent McCree's factual contentions were carefully

considered below and were uniformly resolved in favor of respondent.

In addition, petitioner Lockhart impugns the validity of the studies because of their purported failure to account for "automatic death penalty" jurors (ADPs) and argues that "[a]ll the data will have to be reevaluated or the research will have to be redone in order to make the relevant comparisons." Petition at 22. Amici curiae make a similar claim, repeatedly stating that "[t]he court below assumed, erroneously, that the category at issue was 'Witherspoon excludables' . . . [rather than] those Witherspoon excludables whose absolute opposition to the death penalty could be completely set aside during deliberations on guilt or innocence." Amici Brief at 7; id. at n.9; id. at 10 at n.17.

In fact, the "ADP" issue was discussed extensively below by both parties and was resolved by the District Court after thorough examination. See Supp. App. 81-90. As the Court of Appeals found:

In this case the ADP issue was squarely addressed and both expert testimony and an empirical study were introduced by the state. The district court found that neither significantly undermined the studies presented by petitioners. . . . The court concluded the number of ADPs was negligible. . . ."

App. at A26. The alleged misidentification of the appropriate Witherspoon group, moreover, demonstrates amici's misreading of the opinions and the underlying studies. All of the relevant studies excluded from consideration "[t]hose WEs who could not be fair and impartial in determining guilt-innocence," App. at A18; see also A16; Supp. App. at 44 ("It is, of course, agreed by all that 'nullifiers' are properly excluded from both the guilt/innocence phase and the sentencing phase of a capital case.") The record evidence, in sum, is not impeached by the alleged flaws ascribed to it by petitioner and amici curiae.

Petitioner's other contentions -- its suggestion that the "required" burden of proof "before the federal courts intervene" is "'proof' to a legal certainty," Petition at 23; its argument that a group which it systematically identifies and excludes on the basis of its attitudes in every capital case is somehow not "identifiable" or "cognizable" on those attitudes for Sixth Amendment purposes, Petition at 13 -- obviously invite response on the merits. On certiorari, however, they need not be addressed.

The Court, upon examination of the opinion of the District Court and the Court of Appeals, should deny certiorari on the ground that this case has been correctly decided.

CONCLUSION

The petition for certiorari in this case should be denied.

Dated: July 25, 1985.

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I hereby certify that I am one of the attorneys for respondent Ardia V. McCree and that I served the annexed Memorandum in Response to Petition for Certiorari on all parties by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

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All parties required to be served have been served.

Done this 25th day of July, 1985.


JOHN CHARLES BOGER

REPLY BRIEF

No. 84-1865

Supreme Court, U.S.
FILED

SEP 20 1985

JOSEPH E. SPANIOL, JR.
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In the
Supreme Court of the United States

October Term, 1984

A. L. Lockhart, Director, Arkansas
Department of Correction *Petitioner*

V.

Ardia V. McCree *Respondent*

REPLY BRIEF FOR PETITIONER

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In the
Supreme Court of the United States

October Term, 1984

A. L. Lockhart, Director, Arkansas
Department of Correction *Petitioner*

V.

Ardia V. McCree *Respondent*

REPLY BRIEF FOR PETITIONER

Respondent, in his brief in opposition, concedes that the issues raised by the petition in this case merit further review. In taking that position, respondent has aligned himself with the State of Arkansas, the Eighth Circuit, Pet. App. A-29, twenty-six States supporting the petition as amici curiae, and two Justices of this Court, *see, e.g., Rector v. Arkansas*, 104 S.Ct. 2370 (1984) (Marshall and Brennan, JJ., dissenting from denial of certiorari).

There is good reason for this shared viewpoint. As we noted in our petition, the decision below involves an issue of exceptional importance in its own right. In addition, as the Eighth Circuit recognized, Pet. App. A-28-29, the decision is in conflict with the decision of several other Courts of Appeals, *see, e.g., Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), as well as the position taken by the Supreme Court of Arkansas, *see Rector v. State*, 280 Ark. 385, 659 S.W.2d 168, *cert. denied*, 104 S.Ct. 2370 (1984). And, recently, the Missouri Supreme Court re-

jected that Eighth Circuit's holding in *Grigsby, State v. Nave*, No. 66379 (Mo. Sup. Ct. August 7, 1985), thus aligning it with the Arkansas Supreme Court. *Hendrickson v. State*, 285 Ark. 462, 688 S.W.2d 295 (1985). The need for a definitive resolution by this Court is readily apparent.

Respondent does, however, quarrel with the statement of issues in the petition and suggests that the Court should grant certiorari in some cases other than this one. These points justify a reply.

1. Respondent argues that this case does not involve the seating of jurors unable to apply the applicable law, or the impaneling of two juries in capital cases, Br. in Opp. 6-7. This argument, however, largely assumes its own conclusion: i.e., that the Constitution requires Arkansas to dispense with a single jury for determining both guilt and the applicable sentence. In the State's view, this assumption is incorrect.

No one disputes that Arkansas has historically entrusted the rendering of verdicts and imposition of punishment to a single jury. Respondent also concedes that so-called "Witherspoon-excludables" are, by definition, persons unable to apply the law as charged at the penalty stage. Thus, under the system traditionally employed by Arkansas, it is clear that "Witherspoon-excludables" are jurors who cannot "consider and decide the facts impartially and conscientiously apply the law as charged by the Court." *Wainwright v. Witt*, 105 S.Ct. 844, 850 (1985). What respondent demands, and what the Eighth Circuit has held, is that the State must abandon the system it has always followed and replace it with one that allows "Witherspoon-excludables" to participate in one part of this heretofore unitary process.

In addressing this question, the court below and respondent in his brief in opposition ignore the important state interest in preserving a system of dual responsibility

for its jurors. Thus, while both the Eighth Circuit and respondent freely suggest alternatives to the present system, they do not (and, indeed, cannot) identify any alternative which serves the State's interest in having the same jurors decide guilt and punishment. As the Arkansas Supreme Court has noted, see *Rector v. State, supra*, the present system embodies a commitment to the idea that jurors should not view their role as finders of fact apart from their responsibility to determine the proper sentence. Although it is possible to devise a system that includes "Witherspoon-excludables", it is not possible, by virtue of their inability to apply the relevant law at the time of sentencing, to give them a role that is consistent with the philosophy underlying the State's interest in a unitary jury system.

Thus, respondent misleads the Court in suggesting that he is seeking only the same treatment as defendants in "over 99 percent of all criminal cases." Br. in Opp. 7, quoting Supp. App. 95-96. In all noncapital cases in Arkansas, defendants are tried by a single panel of jurors, each able to abide by his or her oath at every stage of the proceeding. To treat capital cases like noncapital cases, the State must dismiss for cause all "Witherspoon-excludables" because in capital cases they will not follow the law at the penalty stage. Thus, it is respondent, not the State, that seeks to depart from the practice followed in the typical criminal case.

2. Although respondent also argues that this case does not involve respondent's demand for the "inclusion of 'biased jurors,'" Br. in Opp. 6-7, he is silent about the precise nature of his demand and the constitutional right at issue. At the very least, he seems to be claiming a constitutional right to have the State change its system in order to seat, at the guilt stage alone, jurors thought more likely to vote for acquittal. The common characteristic of those jurors, in turn, is apparently an opposition to the death penalty that would prevent them from voting for it pursuant to valid state law.

The Court of Appeals determined that this class of jurors represented a cognizable "cross-section" of the population that could not be systematically excluded for cause. Pet. App. A-7. But this reasoning begs the question. As this Court made clear in *Witherspoon*, a State can systematically exclude a class of jurors who are unable to carry out their responsibilities as they are instructed to do. To justify the decision below, therefore, respondent must go further and claim that, under these circumstances, the Sixth Amendment compels the impaneling of a distinct jury for the determination of guilt or innocence. Yet, neither the Court of Appeals nor respondent has identified any basis in the cross-section cases for holding that it does.

If respondent's claim is that a jury without "Witherspoon-excludables" is necessarily a biased jury, a question not answered by the Court of Appeals, he faces obstacles of a different sort. To begin with, each member of respondent's jury *had* taken an oath to decide the case on the basis of the evidence and arguments presented and the court's instructions. Indeed, several Courts of Appeals have observed that the exclusion of a particular group (even one arguably more likely to acquit) does not mean that the resulting jury is biased. See, e.g., *Keeten*, 742 F.2d at 134; *Spinkellink*, 578 F.2d at 594. In addition, the only support for respondent's showing of bias is a mix of social science studies of dubious value with regard to any claim of bias in this case. To date, this Court has never rested a finding of a biased jury on such uncertain grounds.

We also note that neither the Court of Appeals nor respondent has made clear the relationship between a right to a representative cross-section and a right to an unbiased jury. Although the Court of Appeals plainly read *Witherspoon* as implicating the former right, this Court only last Term cast considerable doubt on that analysis. *Wainwright v. Witt*, 105 S.Ct. at 852 n.5. This case thus presents an opportunity to clarify this unsettled area of law.

3. Despite his belief that the issues in this case warrant review, respondent suggests that the Court should deny certiorari here and grant some other case. The State disagrees for several reasons.

First, the decision below has effectively declared unconstitutional the Arkansas jury system in capital cases. As the State noted in its petition, that holding not only will force Arkansas to abandon its commitment to a unitary jury system in capital cases but also, as interpreted by the Eighth Circuit in subsequent cases, see e.g., *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985), will cast into doubt previous convictions obtained under that system. The State should have an opportunity to defend its system first-hand in the face of such serious consequences.

Second, the record in this case is unusually well-developed. While the State believes that most of the record is of little actual value, respondent appears to accept that the evidence submitted on his behalf offers the best possible support for his position. A decision on this record that no rights were violated — the decision that we believe to be the correct one — would thus give a substantial measure of certainty in future cases.

Third, and in any event, there is no reason for this Court to deny certiorari rather than to hold this case for any other that it might choose to grant. While we believe that the Court should take this case and set it for briefing and argument, at the very least it should hold the case pending resolution of the important issues that it raises.

CONCLUSION

For the reasons stated in the petition and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

NO. 84-1865

Office - Supreme Court, U.S.

FILED

JUN 28 1985

ALEXANDER L. STEVENS
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

A. L. LOCKHART,

Petitioner,

V.

ARDIA V. McCREE,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE,
ALABAMA, COLORADO, CONNECTICUT,
DELAWARE, FLORIDA, IDAHO, ILLINOIS,
INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI,
MISSOURI, NEVADA, NEW HAMPSHIRE, NEW
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
BRIEF OF AMICI CURIAE	1
INTEREST OF AMICI CURIAE	1
REASONS FOR GRANTING THE WRIT	2
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND WITH DECISIONS OF STATE COURTS OF LAST RESORT	2
II. THE DECISION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT	3
III. THE DECISION BELOW PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT	4
A. <i>There is a substantial question whether the two-jury requirement is fair to defendants in capital cases</i>	4
B. <i>The decision below presents substantial questions relating to the States' interest in consistent and impartial adjudication</i>	7
C. <i>The decision below presents substantial questions concerning the extent to which social scientists' opinions should be enacted into positive law by the findings of a trial court reviewing nationwide "legislative" facts</i>	10
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Adams v. Texas, 448 U.S. 38 (1980)	4
Andres v. United States, 333 U.S. 740 (1948)	9
Duncan v. Louisiana, 391 U.S. 145 (1968)	6
Grigsby v. Mabry, No. 83-2113 (8th Cir. Jan. 30, 1985), Slip op. at 24	3
Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980)	3
Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984)	3
Lockett v. Ohio, 438 U.S. 586 (1978)	4
Marsh v. Chambers, 103 S.Ct. 3330 (1983)	4
McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985)	3
O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983)	7, 8
Pitts v. Lockhart, No. 83-2433-EA (8th Cir. Jan. 31, 1985)	2
Rector v. State, 280 Ark. 385, 659 S.W.2d 168 (1983)	3
Smith v. Balkcom, 660 F.2d 573 <i>modified</i> 671 F.2d 858 (5th Cir. 1981)	2, 5, 6
Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)	3, 9
Sullivan v. Wainwright, 104 S.Ct. 450 (1983)	4
Taylor v. Louisiana, 419 U.S. 522 (1975)	6
United States v. Puff, 211 F.2d 171 (2d Cir. 1954)	9
Wainwright v. Witt, 53 U.S.L.W. 4108 (U.S. S.Ct. Jan. 21, 1985)	4, 7
Watson v. Blackburn, 756 F.2d 1055 (5th Cir. 1985)	3
Witherspoon v. Illinois, 391 U.S. 510 (1968)	7, 10
Witt v. Wainwright, 53 U.S.L.W. 3647 (U.S. S.Ct. Mar. 4, 1985)	2
Woodard v. Hutchins, 104 U.S. 752 (1984)	4
Woodard v. Sargent, No. 83-2168 (8th Cir. Jan. 31, 1985)	1

OTHER AUTHORITIES

Kammer, *Final Arguments in a Death Penalty Case*,
in NATIONAL COLLEGE FOR CRIMINAL
DEFENSE, DEATH PENALTY DEFENSE 13
(1983). Cf. TEXAS DISTRICT & COUNTY
ATTORNEYS ASS'N, CAPITAL MURDER
SEMINAR A-1 (1980)

5

NO. 84-1865

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

A. L. LOCKHART,
Petitioner,

V.

ARDIA V. McCREE,
Respondent.

BRIEF OF AMICI CURIAE
IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICI CURIAE

Amici curiae are States whose capital sentencing procedures include decisions by juries. Amici also include States whose capital sentencing is accomplished by judges with or without the intervention of juries, but which nevertheless have an interest in the decision below.*

For States within the jurisdiction of the Eight Circuit, the decision below is of immediate importance because it undermines the validity of existing convictions¹ in capital cases. Further-

* The decision presents questions concerning juror bias and disqualification that may have impact upon States whose sentencing is done by judges, even though those States may not experience the wholesale reversals that could occur in States using juries.

¹ The holding would reverse convictions, not merely sentences. Further, because the Eighth Circuit has held the decision retroactive, see *Woodard v. Sargent*, No. 83-2168 (8th Cir. Jan. 31, 1985), and has also held procedural default not an obstacle to its assertion, *Id.*, Arkansas and other States face the prospect that virtually all convictions in capital cases—their most serious cases

more, the decision would require fundamental changes in these States' capital sentencing statutes. States outside the jurisdiction of the Eighth Circuit also have an interest in the decision because they will be required repeatedly to relitigate the issue until it is finally decided by this Court. Such relitigation is likely to involve extensive consumption of judicial resources because many defendants may feel compelled to attempt to preserve the issue by arguments, evidence, and hearings in individual cases. For the reasons that follow, Amici submit that the Court should grant its writ of certiorari or, in the alternative, should summarily reverse the decision below.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND WITH DECISIONS OF STATE COURTS OF LAST RESORT.

As Arkansas has argued, the decision below is in conflict with other final decisions of courts of appeals and state courts of last resort.² *Smith v. Balkcom*, 660 F.2d 573, modified, 671

of murder—might be invalidated wholesale unless the decision is reversed. It is difficult to overstate the impact the decision has had upon Arkansas, in that the Eighth Circuit has already begun the process of systematically reversing convictions in Arkansas capital cases, including those resulting in life imprisonment (or presumably, even lesser convictions or sentences). E.g., *Pitts v. Lockhart*, No. 83-2433-EA (8th Cir. Jan. 31, 1985) (life-without-parole sentence reversed on same day decision in *Woodard*, holding present case retroactive, was decided; conviction for kidnap-murder, in which victim was taken from his home, bound, gagged, transported in his own vehicle, and found shot four times in the head, also reversed for same reason).

² See also *Witt v. Wainwright*, 53 U.S.L.W. 3647 (U.S.S. Ct. Mar. 4, 1985) (opinion of Mr. Justice Brennan dissenting from denial of certiorari in that case) (noting direct conflict, public importance, and other factors requiring Court to review issue presented here).

F.2d 858 (5th Cir. 1981); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978); *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984); *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc); *Watson v. Blackburn*, 756 F.2d 1055 (5th Cir. 1985); *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983). Amici will not repeat Arkansas' arguments, but they wish to note that the court below expressly recognized these conflicts, acknowledged their significance, and took the unusual step of calling upon this Court to grant certiorari. *Grigsby v. Mabry*, No. 83-2113 (8th Cir. Jan. 30, 1985), Slip op. at 24.³

This conflict is not a minor, reconcilable, or tolerable difference; instead, it is a conflict of the kind that most needs prompt resolution by this Court. Fundamental constitutional standards for death penalty adjudication should not differ drastically from Circuit to Circuit. Uncertainty that undermines confidence in the constitutional adequacy of widely-used procedures for handling serious criminal cases is inappropriate.⁴ The decision will have extremely serious effects in the Eighth Circuit and will prompt the needless waste of state and private resources elsewhere until the issue is resolved by this Court.

II. THE DECISION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

As Arkansas has argued, the decision below is in conflict

³ The Court said, "We are very much aware that our affirmance of the district court here creates a conflict among circuits; this is an important issue since the decision relates to hundreds of prisoners now on death row. We are hopeful the Supreme Court will grant a writ of certiorari and resolve the issue." *Id.*

⁴ The uncertainty is inappropriate not only in the Eighth Circuit but also in States that rely on other circuit decisions to continue using single juries. Furthermore, it is undesirable to inflict such uncertainty on individuals on death row.

with prior decisions of this Court. Amici will not repeat Arkansas' arguments,⁵ but would specially note that the impartiality on sentence that courts are authorized to require by *Wainwright v. Witt*, 53 U.S.L.W. 4108 (U.S.S. Ct. Jan. 21, 1985), is inconsistent with the state of mind of jurors they would be required to seat under the decision below.

III. THE DECISION BELOW PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT.

The court below has invalidated a system for capital sentencing that has been in use for many years. In *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), the "legislative chaplain" case, the Court held that a "practice [that] has continued without interruption ever since [the earliest] session of Congress" did not violate the first amendment. *Id.* at 3334. No State's law requires the cumbersome two-jury approach that the court below mandated for all capital cases. The abrupt change brought about by this decision presents substantial federal questions that should be decided by this Court.

A. *There is a substantial question whether the two-jury requirement is fair to defendants in capital cases.*

Amici would emphasize that there is not only presented the question whether the decision below is fair to States. There is also a substantial question whether it is fair even to defendants.

5 Substantial questions are presented concerning the consistency of the decision below with *Adams v. Texas*, 448 U.S. 38 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Sullivan v. Wainwright*, 104 S.Ct. 450 (1983) (holding petitioner's claim meritless); and *Woodard v. Hutchins*, 104 U.S. 752 (1984), in addition to *Wainwright v. Witt*, as Arkansas argues.

The responsibility of deciding guilt in a capital case weighs heavily upon jurors. The analysis necessary to decide guilt, followed in sequence by the responsibility in the same individuals to determine sentence, prompts significant restraint in most jurors at the sentencing stage.⁶ If the decision below resulted in the impaneling of a *Witherspoon*-qualified jury for the first time after the defendant had been found guilty, so that its members would not share collectively in the process of finding guilt, this additional safeguard against inappropriate use of capital punishment would be removed. Even if certain jurors were merely replaced or dismissed at the sentence stage, the result would be to reinforce the non-responsibility of the sentencing jury for ensuring that the defendant is guilty before sentencing him to death.

Thus Arkansas was entitled to conclude that a process using two separately composed juries would be less fair, rather than more fair, to the defendant. This possibility has caused other courts to reject the reasoning of the court below, and it presents a substantial question that should be decided by this court. *Cf. Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981) ("potential benefit to defendant" of doubts on guilt "would

6 According to a publication of the National College for Criminal Defense, residual doubts about guilt furnish a "particularly powerful" argument against the death penalty. The defense attorney, it is said, should argue that death "is an absolute punishment and . . . is not appropriate for one who is not absolutely guilty (if there are lingering doubts in the evidence)." Kammer, Final Arguments in a Death Penalty Case, in NATIONAL COLLEGE FOR CRIMINAL DEFENSE, DEATH PENALTY DEFENSE 13 (1983). *Cf. TEXAS DISTRICT & COUNTY ATTORNEYS ASS'N, CAPITAL MURDER SEMINAR A-1* (1980) (less-than-ironclad guilt evidence leads jury not to return death penalty).

be lost" if separately composed juries were used).⁷

Furthermore, the likely disadvantages of the two-jury proposal are not confined to the sentencing phase. Guilt-stage jurors, who know that their verdict will lead to the acceptance of responsibility by someone else for determining sentence, may be less restrained in finding guilt than those who know that they must decide the death sentence issue themselves.

Finally, as the court below acknowledged, States using judge sentencing are probably unaffected by this decision. But the requirement of two separately composed juries is so cumbersome that it could induce some States that wish to retain rational capital sentencing to do away with juries at the sentencing stage. While judge sentencing in capital cases is constitutional and may have advantages to recommend it, there is no constitutional basis for an inducement to states to adopt exclusively judge sentencing, and there is substantial ground for difference of opinion among States as to whether it is more desirable or fair to capital case defendants.⁸ This inducement to abolish sentencing juries, which is an unintended by-product of the decision below, also presents substantial questions that should be decided by this Court.

⁷ The fact that jurors have determined guilt beyond a reasonable doubt does not mean that no juror entertained any doubt whatsoever . . .

The scheme appellant here urges upon us would effectively destroy the whimsical doubt. The guilt-determining jurors—including those not absolutely certain—would be thanked for their service and discharged. A new jury, including only those willing to impose the death penalty, would be selected. They would entertain no doubt Certainty of guilt would replace any whimsical doubt entertained by the replaced jurors.

Smith v. Balkcom, supra, 660 F.2d at 580-81.

⁸ For deciding guilt or innocence, we use juries "in preference to the professional and perhaps overconditioned or biased response of a judge." Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968), quoted in Taylor v. Louisiana, 419 U.S. 522, 530 (1975). Juries may

B. The decision¹ below presents substantial questions relating to the States' interest in consistent and impartial adjudication.

The court below assumed, erroneously, that the category at issue was "Witherspoon excludables" ("WE's"). Instead, however, the affected category is only those *Witherspoon* excludables whose absolute opposition to the death penalty could be completely set aside during deliberations on guilt or innocence, even though guilt is a step toward the very death sentence they so oppose.⁹ While the court below did not assess the number of these persons or the accuracy with which they can be identified, the issue presents substantial questions that should be determined by this court.

The two categories considered by other courts consist, respectively, of persons qualified as impartial on sentence and persons disqualified on sentence. This distinction requires great effort in the lower courts, because the question itself causes confusion and indecision in many venirepersons.¹⁰ To

provide a degree of community restraint in imposition of capital punishment, and they provide a fact-finder fully separated from popular pressures as well. The point, however, is not that jury sentencing is somehow superior to judge sentencing, which also has advantages; the point, instead, is that there can be legitimate differences of opinion on the matter, and the States should have the ability to decide it.

⁹ The court upheld the district court's findings "that the [Witherspoon excludable] group is . . . between 11% and 17% of those eligible for jury service. So the group excluded is both distinct and sizeable." Slip Op. at 8.

The court missed the point. Many of the 11% to 17% would be excluded under the court's own holding, because they not only would be unable to assess a sentence of death but also would be unable to find guilt without bias in a capital case. The actual number at issue must necessarily be considerably smaller and more difficult to determine.

¹⁰ Cf. *Wainwright v. Witt*, supra; see also *O'Bryan v. Estelle*, 714 F.2d 365, 379 (5th Cir. 1983), cited in *Witt*, supra, 53 U.S.L.W. at 4112.

these categories, the court below would add a third: persons who admit to such serious objections against capital punishment that they cannot be qualified (and who know that guilt is a step toward that result), but who nevertheless predict that they can so completely put the issue out of their minds as to be unbiased on guilt or innocence. As a matter of logic, such a state of mind is possible. As a matter of practicality, most lay persons would regard it as contradictory. This requirement would disproportionately increase the complexity (and reduce the accuracy) of the inquiry, and the number of venire members accurately so described must be very small.¹¹

There is a substantial question whether such persons comprise an "identifiable class" of persons in the sense that they can really be accurately identified in the venire. A statement of bias against sentence but impartiality on guilt-innocence is easily made but remains a prediction of the juror's future behavior under the conditions of trial and deliberation, which a venire member can only imagine. The likelihood that such a prediction will be the product of poor communication, confusion, or overestimation by the venire member of his own capacity for impartiality increases with the complexity of the inquiry the Eighth Circuit has thus mandated.¹² Erroneous categorization, in turn, increases the difficulty of attaining evenhanded, consistent determination of capital cases.

To these concerns must be added the possibility of direct frustration of the guilt-innocence determination. Several courts have raised the possibility that persons absolutely opposed to capital punishment might consider it their duty to serve on the jury at the guilt stage, and, while doing so, might consider it their further duty to vote so as to prevent the morally repugnant outcome of capital punishment—i.e., to vote against conviction irrespective of the evidence. One judge in *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983), referred to such a person

11 See note 9 supra.

12 See authorities cited in note 10, supra.

perjoratively as the "lying" juror.¹³ While deliberate falsification might occur, the more likely possibility is that a venireperson would have simply overestimated the capacity of his or her mind to apply cold logic in disregard of the consequences.

There are some states of mind that make impartiality so difficult that the law is justified as treating it as unattainable. Thus, for example, if a defendant's brother were a member of the venire, he could be excluded even if he stated that he could decide guilt with total impartiality. It is not unreasonable for a state to conclude that conscientious rejection of capital punishment in a capital case is similar,¹⁴ and the decision below presents substantial questions by precluding that result. See, e.g., *Spinkellink v. Wainwright*, 578 F.2d at 595-96 (possibility of bias in such circumstances is "too fundamental to risk");¹⁵ *United States v. Puff*, 211 F.2d 171 (2d Cir. 1954) (concern that such a jury would be "in reality a 'partisan jury'"); *Andres v. United States*, 333 U.S. 740, 766 (1948) (Frankfurter, J., concurring)

13 *O'Bryan v. Estelle*, 714 F.2d 365, 406 (5th Cir. 1983) (Buchmeyer, J., dissenting).

14 Thus one juror in one of the cases at bar testified:

JUROR MCDONALD: I'm Deloyse McDonald. It would violate my conscience to issue a death penalty.

THE COURT: If you were selected to serve on this jury, Would you refuse under any circumstances?

JUROR MCDONALD: Yes sir. . . .

While the court went on to clarify that the refusal extended to the duty "to impose the death penalty," it is unlikely that most such persons could accurately separate such a decision from a guilt finding that was a step toward a death penalty. Slip Op. at 34-35 & n.1 (dissenting opinion).

15 . . . Impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution. . . . Florida has determined . . . that although a person states that he could fairly judge guilt or innocence, if he also states that he has irrevocably committed before the trial to vote against the penalty of death regardless of the facts that might emerge at trial, he must be excluded. . . . The Constitution does not prevent this judgment. *Spinkellink v. Wainwright*, supra, 578 F.2d at 595-96.

(possibility that such a juror "can hang the jury if he cannot have his way").

C. *The decision below presents substantial questions concerning the extent to which social scientists' opinions should be enacted into positive law by the findings of a trial court reviewing nationwide "legislative" facts.*

The evidence in this case consists largely of studies by statisticians and sociologists. Such evidence can be useful and indeed persuasive in some cases, particularly when it determines "adjudicative" facts directly and clearly. On the other hand, when it consists of inquiries that are related inferentially¹⁶ to the behavior at issue, and it affects "legislative" facts (or facts underlying the interpretation of law), it should be considered with more caution. A single district judge should not be required to decide upon interpretations of "facts" of this kind, in a case in which conflicting evidence would support a wide variety of inferences,¹⁷ and thereby to bind the entire nation to a result that dispenses on constitutional grounds with procedures of long duration. The decision below presents substantial questions in this regard.

CONCLUSION

Because of the conflicts among the courts, the court of appeals' own express call in this case for review, and the sub-

16 As Arkansas argued, behavior of jurors deciding death penalty cases in fact is likely to be different from that of subjects responding to attitudinal surveys and simulations. The court below concluded that "we should not now reject a study because of this deficiency." Slip Op. at 21.

17 In particular, had the court considered the number of "Witherspoon excludables" able to set aside their opposition to the death penalty in deciding guilt in a capital case, as distinct from the total number of Witherspoon excludables, it might well have reached a different conclusion, since many of the latter would be excluded under the lower court's own approach. See note 9 *supra* and accompanying text.

stantial federal questions at issue, this honorable Supreme Court should grant its writ of certiorari or, in the alternative, should summarily reverse the decision below.

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JOINT APPENDIX

No. 84-1865

Supreme Court, U.S.

FILED

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**In the
Supreme Court of the United States**

October Term, 1985

A. L. Lockhart, Director,
Arkansas Department of Correction *Petitioner*

V.

Ardia V. McCree *Respondent*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
Chronological List of Relevant Pocket Entries	1
Amended Petition for Writ of Habeas Corpus filed in the United States District Court, Eastern District of Arkansas, Pine Bluff Division, <i>McCree v. Housewright</i> , No. PB-C-80-429, July 7, 1981	4
Stipulation by the parties that McCree's claim regarding "death qualification" could be consolidated with <i>Grigsby v.</i> <i>Mabry</i> , No. PB-C-78-32 for disposition, July 14, 1981	9
Order of Honorable Elsjane T. Roy transferring McCree's claim regarding "death qualification" to Honorable G. Thomas Eisele for hearing and disposition, July 16, 1981	10
Answer to second amended petition for writ of habeas corpus, July 21, 1981	11
United States District Court Memorandum, Opinion in <i>Grigsby v. Mabry, McCree</i> <i>v. Housewright</i> , and <i>Hulsey v. Sargent</i> , (Eisele, J.) (August 5, 1983) (Repro- duced in Supplemental Appendix to Petition for Writ of Certiorari).	N/A
United States District Court Memorandum Opinion and Order issued in <i>Grigsby</i> <i>v. Mabry, McCree v. Housewright</i> ,	

and *Hulsey v. Sargent* (Eisele, J.),
August 18, 1983.....

Opinion of the United States Court of
Appeals for the Eighth Circuit,
Mabry v. Grigsby and *Housewright*
v. McCree, No. 83-2113, January 30,
1985, (Reproduced in Appendix to
Petition for Writ of Certiorari A-1).....N/A

Exhibit CH-5.....	21
Exhibit CH-24.....	77
Exhibit CH-29.....	86
Exhibit CH-30.....	87
Exhibit CH-31.....	88
Exhibit CH-32.....	89
Exhibit CH-33.....	90
Exhibit CH-35.....	91
Exhibit CH-36.....	92
Exhibit CH-38.....	93
Exhibit CH-39.....	94
Exhibit CH-40.....	96
Exhibit CH-41.....	98
Exhibit CH-42.....	99

Exhibit CH-42-1.....	100
Exhibit CH-47.....	101
Exhibit CH-48.....	102
Exhibit CH-49.....	103
Exhibit CH-50.....	104
Exhibit CH-53.....	105
Exhibit CH-54.....	106
Exhibit EB-64.....	107
Exhibit EB-66.....	121
Exhibit EB-67.....	122
Exhibit EB-68.....	123
Exhibit EB-69.....	124
Exhibit EB-70.....	125
Exhibit EB-71.....	126
Exhibit EB-72.....	127
Exhibit EB-73.....	128
Exhibit EB-74.....	129
Exhibit EB-75.....	130
Exhibit EB-76.....	131
Exhibit EB-77.....	132

Exhibit EB-78.....	133
Exhibit EB-129.....	134
Exhibit EB-130.....	135
Exhibit RH-11.....	136
Exhibit RH-14.....	137
Exhibit AY-1.....	138
Exhibit AY-2.....	140
Exhibit AY-3.....	141
Exhibit AY-4.....	143
Exhibit AY-5.....	146
State's Exhibit 2.....	147

No. 84-1865

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Ardia V. McCree *Respondent*

ON WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

PROCEEDINGS

Date	
12/28/80	Petition for Writ of Habeas Corpus filed in the United States District Court, Eastern District Court, Eastern District of Arkansas, Pine Bluff Division, <i>McCree v. Housewright</i> , No. PB-C-80-429.
1/26/81	Answer to Petition for Writ of Habeas Corpus.

4/3/81 Motion of Petitioner for Permission and Leave to Amend Petition for Writ of Habeas Corpus. Amended Petition Tendered.

4/14/81 Order of Magistrate granting petitioner's motion to file amended petition.

6/1/81 Response to Amended Petition for Writ of Habeas Corpus.

7/7/81 Amended Petition for Writ of Habeas Corpus.

7/13/81 to 7/17/81 Evidentiary Hearing before Hon. G. Thomas Eisele on "death qualification" issue, *Grigsby v. Mabry* and *McCree v. Housewright*.

7/14/81 Stipulation by parties that McCree's claim regarding "death qualification" could be consolidated with *Grigsby v. Mabry*, No. PB-C-78-32, for disposition.

7/16/81 Order of Hon. Elsi Jane T. Roy transferring McCree's claim regarding "death qualification" to Hon. G. Thomas Eisele for hearing and disposition.

7/21/81 Answer to second amended petition for writ of habeas corpus.

7/29/81 to 7/31/81 Evidentiary Hearing before Hon. G. Thomas Eisele on "death qualification" issue, *Grigsby v. Mabry* and *McCree v. Housewright*.

8/5/83 United States District Court Memorandum Opinion issued in *Grigsby v. Mabry* and *McCree v. Housewright*. (Eisele, J.).

8/8/83 Notice of Appeal by Respondent.

8/9/83 Motion for Stay Pending Appeal by Respondent.

8/17/83 Appeal docketed by United States Court of Appeals for the Eighth Circuit.

8/18/83 United States District Court Judgment. United States District Court Memorandum Opinion and Order issued in *Grigsby v. Mabry* and *McCree v. Housewright*, (Eisele, J.). Stay granted.

9/9/83 Petition for Hearing En Banc before the United States Court of Appeals for the Eighth Circuit filed by Appellant.

11/8/83 Hearing En Banc granted.

3/15/83 Case argued and submitted to United States Court of Appeals for the Eighth Circuit.

1/30/85 Opinion of the United States Court of Appeals for the Eighth Circuit in *Mabry v. Grigsby* and *McCree v. Housewright*, No. 83-2113. Judgement entered.

3/4/85 Appellant's motion to stay mandate.

3/18/85 Order of the United States Court of Appeals for the Eighth Circuit correcting its opinion by adding footnote 35.

3/19/85 Stay of Mandate granted by the United States Court of Appeals for the Eighth Circuit.

5/29/85 Petition for Writ of Certiorari to Eighth Circuit Court of Appeals filed.

10/7/85 Petition for Writ of Certiorari granted.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Ardia V. McCree

Petitioner

VS.

No. PB-C-80-429

Vernon Housewright, Director,
Arkansas Department of Corrections

Respondent

AMENDED PETITION FOR
WRIT OF HABEAS CORPUS

Comes the Petitioner, through his appointed attorney, William R. Wilson, Jr., and for his Amended Petition for Writ of Habeas Corpus, states:

1. Judgment was entered by the Circuit Court of Ouachita County, Camden, Arkansas.
2. Date of judgment was May 12, 1978.
3. Petitioner was sentenced to life without parole.
4. The conviction was for capital felony murder.
5. Petitioner's plea was "not guilty".
6. Petitioner was tried by jury.
7. Petitioner did not testify at trial.
8. Petitioner appealed the judgment of conviction.
9. Appeal was to Arkansas Supreme Court. Appeal denied (*McCree v. State*, 266 Ark. 465 [September 10, 1979]).

10. Petitioner has previously filed other petitions with respect to this judgment.

11. (a) A Petition for Permission to Proceed under Criminal Procedure Rule 37 was filed with the Arkansas Supreme Court. Petitioner alleged as grounds:

1. Illegal use of video taped statement;
2. Improper expert testimony;
3. Improper bias by trial court;
4. Improper jury instruction;
5. Ineffective assistance of counsel.

No evidentiary hearing was held and the Petition was denied by a Per Curiam Order of the Arkansas Supreme Court dated November 17, 1980.

(b) A Petition for Rehearing on Rule 37 Petition was filed with the Arkansas Supreme Court. No evidentiary hearing was held and the Petition was denied on December 3, 1980.

12. Petitioner, as his grounds, states:

* * *

D. *Ground Four*: Petitioner was denied the right to a fair and impartial jury as required by the Sixth and Fourteenth Amendments.

1. The jury panel which convicted Petitioner was not representative of the cross section of the community in which Petitioner resided as it excluded at the guilt or innocence phase all those veniremen who expressed any reservations about the death penalty. Nine veniremen were excluded for cause on *Witherspoon* grounds (*Witherspoon*

v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 [1968]) and three of the four peremptory challenges exercised by the Prosecution were used to remove all other veniremen who expressed even doubts over the imposition of the death penalty. Thus, at the initial stage of determining guilt or innocence, a cognizable group of the population was removed from Petitioner's panel (see Harris Poll which shows 30 + % of the population opposed to the death penalty). Writing in *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029 (1978) Mr. Justice Blackmun succinctly pointed out that, "The Court repeatedly has held that meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service." at 237.

Not only is a cognizable group excluded under this procedure because of attitudes, studies available to Petitioner which will be presented to this Court show that the "death-qualification" process tends to disproportionately exclude blacks, women, and members of certain religious groups from jury service because of their attitudes towards the death penalty. It is to be noted that as a result of the exclusions of veniremen in this case, Petitioner was tried by an all white jury. The Supreme Court has consistently recognized that a group may be "distinct" because of its attitudes, experiences, and outlooks (see *Taylor v. Louisiana*, 419 U.S. 522 [1974] and *Duren v. Missouri*, 439 U.S. 357 [1979]). In *Duren* the Court noted that it would require that "a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." at pp 367-368. The State of Arkansas does not have a significant interest in excluding at the guilt or innocence phase of the trial, those veniremen opposed to the death penalty—to the contrary, it has a totally improper purpose as discussed below.

2. A "death-qualified jury" is not an impartial jury. In *Witherspoon v. Illinois*, the Petitioner presented empirical data to show that those persons who either favor or are not

opposed to the death penalty are "conviction-prone". Various studies within the field (see *Grigsby v. Mabry*, 483 F.Supp. 1372 [E.D. Ark. (1980)] and *Hovey v. Superior Court*, 28 Cal. 3rd 1 [1980]) would provide as a definitional standard of "conviction-proneness" the following factors:

- (a) An automatic assumption that the defendant must be guilty or the police wouldn't have arrested him (or her).
- (b) A tendency to give more credence to evidence presented by the prosecution than to that presented by Defendant.
- (c) A tendency to require a Defendant to "prove" innocence.
- (d) An attributing of guilt to the Defendant who does not take the stand in his own defense.

Although there are still other factors, these more significant ones show the inescapable result—and the unwritten reason why the Prosecution strives so mightily to "death-qualify" a jury—such a jury is, beyond peradventure, a "hanging jury" which is uniquely unqualified to sit in judgment of a defendant's guilt or innocence.

The Supreme Court, in *Witherspoon*, found the evidence insufficient to establish this contention, but no such insufficiency exists at the present time, and Judge Eisele writing in *Grigsby v. Mabry*, *supra*, says of Grigsby's evidentiary hearing:

A number of studies were submitted in evidence for the Court to consider. From these studies emerges the conclusion that in 1976 when the requested continuance was denied, there was, and at present there is, sufficient evidence from which a Court could have found, and can find, that a death qualified jury is more likely to find guilt than is a jury chosen without regard to *Witherspoon* scruples against the death penalty.

at P ____ (footnotes omitted)

No valid State interest can be shown to exist in excluding—at the guilt or innocence phase—those persons opposed to the death penalty. And when such procedure results, as it invariably must, in the empaneling of a conviction-prone jury, it cannot be allowed to stand.

13. All grounds above have been presented to the Arkansas Courts.

14. Petitioner has no other petition or appeal pending.

15. (a) Petitioner was represented at trial and direct appeal by:

Christopher Mercer
2901 High Street
Little Rock, Arkansas 72206

(b) Petitioner was *pro se* in his Rule 37 action.

16. Petitioner was sentenced on only one count.

17. Petitioner is under no other sentence.

WHEREFORE, Petitioner prays that this Court grant all relief to which he may be entitled in this proceeding.

WM. R. WILSON, JR., P.A.
Post Office Box 71
Little Rock, Arkansas 72203
(501) 375-6453

BY: /s/ WM. R. WILSON
Wm. R. Wilson, Jr.

(CERTIFICATE OF SERVICE
OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION
(Title Omitted in Printing)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED TO by and between counsel for the parties to the above-captioned action:

1. That the parties agree that this Court shall consider as admissible for all purposes any or all evidence admitted during the evidentiary hearing scheduled to commence on July 13, 1981, in *Grigsby v. Mabry*, PB-C-78-32, subject to the following conditions:

(a) The parties to the *McCree* action waive technical objections to the authenticity of exhibits and documents offered in evidence in the July 13th hearing;

(b) the parties to the *McCree* action reserve the right to object to any evidence offered during the July 13th hearing, including testimony or exhibits, on grounds of relevancy to petitioner McCree's claims.

(c) the parties to the *McCree* matter reserve the right to supplement the record by additional evidence on appropriate motion;

(d) neither party to the *McCree* action by this stipulation waives any right of appeal of any issue regardless of whether appellate review is sought by either party in *Grigsby v. Mabry*.

2. This stipulation shall not be interpreted to affect constitutional claims asserted by petitioner McCree other than the claims respecting the death-qualification of his trial jury.

3. Subject to the terms and conditions set forth above, the parties to this action agree to be bound by the Court's decision in *Grigsby v. Mabry* with respect to the issue relating to the death-qualification of his trial jury.

DATED: July 14, 1981

/s/ Wm. R. Wilson, Jr.
Attorney for Petitioner McCree

/s/ Dennis R. Molock
Attorney for Respondent

SO ORDERED:

G. THOMAS EISELE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION
(Title Omitted in Printing)

ORDER

1. The parties hereto have stipulated that the portion of Petitioner's claims pertaining to "death qualification" of Petitioner's state trial jury can be heard by the Honorable G. Thomas Eisele concurrently with a hearing being held by Judge Eisele in *Grigsby v. Mabry*, No. PB-C-78-32.

2. The Stipulation attached as Exhibit "A" is approved.

3. This Court hereby transfers the above-referenced claims of Petitioner to the Honorable G. Thomas Eisele for the purposes of the above-referenced hearing.

IT IS SO ORDERED.

/s/Elsijane T. Roy

Dated: July 16, 1981

APPROVED:

WM. R. WILSON, JR., P.A.
Post Office Box 71
Little Rock, Arkansas 72203
(501) 375-6453
Attorney for Petitioner

By: /s/ Wm. R. Wilson, Jr.
Wm. R. Wilson, Jr.

STEVE CLARK
Attorney General
Justice Building - State Capitol Grounds
Little Rock, Arkansas 72201
(501) 371-2007
Attorney for Respondent

By: /s/ Dennis R. Molock
Dennis Molock

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION
(Title Omitted in Printing)

ANSWER TO SECOND AMENDED PETITION FOR
WRIT OF HABEAS CORPUS

Comes the respondent, through his attorneys, Steve Clark, Attorney General, and Dennis R. Molock, Deputy Attorney General, and for his answer to the petitioner's second amended petition, states:

I.

The petitioner is in the custody of the Arkansas Department of Correction as a result of having been found guilty of capital felony murder by a jury of his peers in the Ouachita County Circuit Court. The petitioner was sentenced to a term of life imprisonment without parole on May 12, 1978.

II.

The petitioner pursued a direct appeal to the Arkansas Supreme Court wherein he presented five issues for review. Such issues included those set forth in the petitioner's second amended petition and designated numbers three (denial of continuance) and four (impartial jury). The Arkansas Supreme Court affirmed the judgment of conviction on September 10, 1979. See *McCree v. State of Arkansas*, 266 Ark. 465, 585 S.W.2d 938 (1979).

III.

The petitioner sought permission from the Arkansas Supreme Court to proceed in Ouachita County Circuit Court pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. In such petition, the petitioner raised those issues which are set forth in his second amended petition for habeas corpus relief and which are designated numbers one (improperly obtained video-taped statement) and two (ineffective counsel). The Arkansas Supreme Court denied such petition in a Per Curiam Order dated November 17, 1980.

IV.

The petitioner has exhausted available state remedies with respect to the issues which are raised in his second amended petition.

• • •

VIII.

The petitioner's final asserted ground for relief is that he was denied the right to a fair and impartial jury; and that his jury panel which was properly seated in accordance with *Witherspoon v. Illinois*, 391 U.S. 510 (1968) was guilty prone.

The United States Supreme Court noted in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) that a venireman must be willing to *consider* all of the penalties provided by state law and when a venireman is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings he can be struck for cause. 391 U.S. at 522-23, n.21 (emphasis in original). The record of petitioner's trial reveals that those persons who were struck for cause had indicated that they could not consider all of the applicable penalties. Such persons were therefore properly struck in accordance with the Supreme Court's decision in *Witherspoon, supra*.

The Supreme Court noted in the *Witherspoon* decision that the decision does not affect the validity of any sentence *other* than death, nor does such holding render invalid the conviction as opposed to the sentence, 391 U.S. at 522-523, n. 21 (emphasis in original).

The record reflects that the jury was composed of twelve impartial fact-finders who would consider the applicable laws as per the court's instructions. Respondent is unaware of any case which attaches validity to the assertion that a jury composed entirely of persons who will consider the death penalty is more likely to render a verdict of guilty. In *Witherspoon, supra*, the Supreme Court stated:

"We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice,

that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." 391 U.S. at 518.

See also, *Spinkellink v. Wainwright*, 578 F.2d 582 (55th Cir. 1978) where the Fifth Circuit Court of Appeals stated:

... In other words, the veniremen indicated only that they would be willing to perform their civic obligation as jurors and obey the law. Such persons cannot accurately be branded prosecution-prone. 578 F.2d at 594.

The federal courts have ruled that an Arkansas "death-qualified" jury is not violative of the Sixth Amendment, concluding:

... The petitioner will be denied relief on the ground that his constitutional right to a jury drawn from a fair representative cross-section of the community was violated.

Grigsby v. Mabry, 483 F.Supp. 1372, 1385 (E.D. Ark. 1980); modified in *Grigsby v. Mabry*, 637 F.2d 525 (8th Cir. 1980). The Court's ruling in *Grigsby*, *supra*, is dispositive of the issue raised by the petitioner herein.

WHEREFORE, respondent prays that the requested relief be denied and that the petition be dismissed.

Respectfully submitted,

STEVE CLARK
Attorney General

BY: /s/ DENNIS R. MOLOCK
DENNIS R. MOLOCK
Deputy Attorney General

Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

ATTORNEYS FOR RESPONDENT

(CERTIFICATE OF SERVICE
OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JAMES T. GRIGSBY PETITIONER

v. NO. PB-C-78-32

JAMES MABRY, Commissioner,
Arkansas Department of Correction RESPONDENT

DEWAYNE HULSEY PETITIONER

v. NO. PB-C-81-2

WILLIS SARGENT, Superintendent of
the Cummins Unit Penitentiary,
Grady, Arkansas RESPONDENT

ARDIA MCCREE PETITIONER

v. NO. PB-C-80-429

VERNON HOUSEWRIGHT, DIRECTOR,
Arkansas Department of Correction RESPONDENT

MEMORANDUM OPINION AND ORDER
(Filed August 18, 1985)

Pending before the Court is the Respondents' "Motion for Stay Pending Appeal."

The merits of the death qualification issues appear clear enough.¹ Before elaborate and exhaustive attention is given to one of the possible penalties, death, the focus should be upon fairly determining *if the defendant* in a capital case is or is *not guilty*.² If, but only if, he is found guilty may broad attention be turned to the selection of jurors who can, fairly to the state and the defendant, consider all penalties (including the penalty of death) prescribed by the State law. Such propositions appear, as a matter of constitutional law, almost self-evident.

1

The Court's decision of August 5, 1983, holding that death qualified juries are less representative and more guilt-prone *than non-death qualified juries* does not reflect in any way upon the good faith and conscientiousness of jurors chosen to serve on death qualified juries or, indeed, suggest that conviction decisions actually rendered by such juries were necessarily wrong. As pointed out in that opinion, the effects noted operate consequentially only in the closer or more ambiguous cases. That a jury composed only of bank presidents might on a statistical basis be more likely to convict in a burglary case than a jury composed of a fair cross-section of the community is no reflection on the good faith or conscientiousness of either such jury. Indeed the death qualification process reflects adversely and unfairly on only one group—*those excluded*—by implicitly suggesting that those who strongly oppose the death penalty do not believe that murderers should be convicted and punished. History (note Arkansas history as an example), judicial notice and the evidence in this case demonstrate the untruth and absurdity of such a proposition.

It is a truism of the adversary system that the lawyers will, during the jury selection process, attempt to obtain a jury favorable to their client's interest. It is their duty to do so. Each, within broad limits, may use peremptory challenges in an attempt to obtain that objective. But the decision of August 5, 1983, states that no juror may be *systematically excluded by the Court* on the basis of a for-cause challenge when there is no "cause" or reason for doing so. The opinion reaffirms the *Principle of inclusion* of all as jurors in capital cases who can fairly try the issues presented upon the basis of the law and the evidence.

2

This is not a radical or novel principle. The State of Arkansas itself operated under such a principle until at least the late 1950s. And it goes without saying that those non-death-qualified juries sentenced many defendants to death. So even if the State of Arkansas opted to try both the guilt phase and the penalty phase with the same non-death qualified jury it is likely that in many cases it would, as before, succeed in getting such juries to impose the death penalty. But it may, under the Court's ruling, if it wishes, death qualify penalty-phase juries.

The serious and difficult problem arises because of the *Potential consequences* of the Court's ruling. The United States Supreme Court itself may have considered the potential wrenching consequences when it failed to adopt a *per se* rule in *Witherspoon v. Illinois*, 391 U.S. 510, back in 1968. By its ruling in that case it invited further study. Although the results of such studies are in, and are overwhelming in the direction of their thrust and in their consistency, this Court now believes they were unnecessary. The Supreme Court should, it is respectfully suggested, have relied upon traditional legal analysis, rather than social science and empirical studies, in adopting a *per se* rule back in 1968 consistent with established constitutional principles. There is no good or convenient time to correct a broadly-followed unconstitutional practice. Fifteen years after *Witherspoon*, however, the issues can no longer be avoided despite the turmoil which may result from the delay in coming to grips with those issues.

While, as stated, the merits appear clear to the Court, the State is correct in noting that no other court has yet held death qualification under *Witherspoon* standards unconstitutional. So very serious and fundamental issues will be presented to the appellate courts by virtue of the State's appeal. and, of course, the outcome cannot be predicted with any degree of assurance.

The remedy creates the larger problems. If the ruling could be applied only prospectively there would be few problems. But, because the death qualification procedure contaminates the fact-finding function of the jury charged with deciding the guilt-innocence of the defendants in capital cases, the obvious remedy according to traditional constitutional notions is a new trial. This is the remedy this Court, after long consideration and much hesitation, felt compelled to order. But the Eighth Circuit in its *Grigsby* decision made a point about the appropriate remedy that suggests its great concern also. Of course this Court has held in *Hulsey v. Sargent*, 550 F. Supp. 179 (E.D. Ark. 1981), that

the death qualification issues may not be considered unless raised before the trial in State court.³ If its *Hulsey* ruling is upheld then that will greatly reduce the number of persons who may ask for a new trial on this ground. Still, it is likely that many defendants, particularly those tried in the last five years, may have challenged the death qualification procedures during their trials in state court. So, it is likely that many may be in a position to raise the issue. However, higher courts might, even if they affirm this court's rulings on the underlying issues,—a proposition which the State contends is most questionable—decide to give such rulings only a prospective effect. Such a decision would dramatically reduce the problems facing the states, leaving the relatively simple problem of adopting procedures which will permit the states in future trials to provide for the death qualification of those "penalty" juries which are asked by the State to impose the death penalty.⁴

Because of the great State interest in ascertaining what procedures will ultimately be required and because of the great number of potential habeas petitions which could result from, or be affected by, the court's rulings, this Court will grant the State's petition for a stay pending appeal. The State is entitled to adequate time to obtain appellate review unhampered by the necessity of dealing with the problems incident to the possibility of new trials.

The Court's order does not deprive Mr. McCree of any legally compelling cognizable right to be released on bond

3

This Court has held that Mr. Hulsey failed to raise the issue and therefore cannot raise it now. Mr. Grigsby offered to make an evidentiary showing as suggested in *Witherspoon* that a death qualified jury would not be representative and also would be guilt prone in comparison with a non-death qualified jury. So Mr. Grigsby clearly raised the issue. Mr. McCree filed a motion in the Circuit Court of Ouachita County which states, *inter alia*:

That said statute is unconstitutional in its application, and in violation of the Sixth Amendment to the United States Constitution, in that

specifically in this case, death qualification was required of the prospective jurors and "death qualification" as imposed herein violates the defendant's right to a jury which represents a cross-section of the community, excluding those members of the community who are most likely to be merciful and leaves the defendant in the hands of a jury stripped of the group with humane inclinations, and is "prosecution prone", and is therefore not a fair and impartial jury.

T. Tr. 13

It will be noted that Mr. McCree did *not* make any offer to prove by evidence that death-qualified juries would not be representative or that they would be guilt prone. So it can be argued that Mr. McCree, too, like Mr. Hulsey, failed to properly raise the issue and, therefore, should be barred from raising it now. In other words, under *Witherspoon* itself death qualified juries were presumed to meet constitutional standards *absent an evidentiary showing to the contrary*. This Court has ruled that Mr. McCree did, in an adequate fashion, raise the issue. This conclusion is based upon the stipulation of the parties and upon this Court's further view that a *per se* rule should be adopted even in the absence of the evidentiary showing invited in *Witherspoon*. If this view is incorrect, i.e., if this Court's rulings are upheld only upon the basis of the evidentiary proof that establishes that death qualified juries are factually unrepresentative and guilt-prone, then it might further be held that persons like Mr. McCree, who failed to at least make an offer of proof as invited by *Witherspoon*, did not properly tender the issue in their state court case and therefore are barred from raising it later.

Mr. McCree's right to raise the issues is clear. The State of Arkansas raised no *Wainwright v. Sykes* issue with respect to Mr. McCree's "Grigsby" claim. Indeed, Mr. McCree and the State stipulated that the resolution of Mr. Grigsby's claim would control Mr. McCree's death qualification challenge. The stipulation, entered into on July 14, 1981, provides that, subject to the right of appeal, "the parties to this action agree to be bound by the Court's decision in *Grigsby v. Mabry* with respect to the issue relating to the death qualification of his (McCree's) trial jury."

4

The Court expresses no opinion that the *present* statutory law of the State of Arkansas would have to be changed in order to have two completely separate juries, one for the trial of the defendant's guilt-innocence and the other for the penalty phase assuming a conviction were obtained. It is unclear how the State presently handles the situation where one or more of the jurors at the trial of defendant's guilt may die or otherwise be unavailable for the penalty phase.

pending his new trial. The Arkansas Constitution provides that all "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Art. 2, §8. It is clear that Mr. McCree's prior conviction for the capital offense would satisfy the state constitutional requirement that the "proof is evident" or that the "presumption is great." Furthermore, the relevant provisions of the Federal rules grant this Court the discretion to deny a petitioner his release pending an appeal of a decision granting his petition for a writ of habeas corpus. Rule 23(c) of the Federal Rules of Appellate Procedure provides that: "Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court . . . shall otherwise order." For the reasons expressed in this memorandum, the Court in the exercise of its discretion is, consistent with Arkansas law, ordering "otherwise."

It is therefore ordered that respondents' "Motion for Stay Pending Appeal" be, and it is hereby, granted. Respondents are hereby ordered to retry or to free Mr. McCree within 90 days of the issuance of the mandate from the Eighth Circuit Court of Appeals on the State's appeal of this cause should this Court's decision be affirmed and the relief granted by this Court not be altered or modified by the Eighth Circuit.

Dated this 18th day of August, 1983.

/s/ Garne't Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

The following studies, tables, charts and graphs were admitted into evidence at the evidentiary hearing held before the Honorable G. Thomas Eisele on July 13-17 and July 29-31, 1981.

EXHIBIT CH-5

Some Data on Juror
Attitudes Towards Capital
Punishment

by
Hans Zeisel

Center for Studies in Criminal Justice
University of Chicago Law School

Introduction

This is an elegant and compelling study; a demonstration rather than a submission. It marshalls data to establish the injustice and, I would think, the unconstitutionality of the present acceptance of a challenge for cause based on a juror's scruples against capital punishment.

Professor Zeisel's analysis leads inexorably to the conclusion that if we are to rely on jury determination of capital cases, we can no longer unjustly skew the composition of the jury in this way. And the skewing goes not only to the question of the appropriate punishment but, more importantly, to the central issue of conviction or acquittal.

The American Jury has proved to be a rich lode of empirical data on the workings of the criminal justice system, productive of a diversity of insights. It is a privilege for the Center for Studies in Criminal Justice to support one of the authors of that book in this later mining of its riches.

The present study has two clear values. It compels modification of the present operation of the challenge for cause in capital cases. Further, it is a model of how to collect, collate, and present empirical data to the determination of what has until now been treated as a procedural issue of law to be settled by reflection and discussion, unfettered by facts.

The potential juror's admitted scruples against capital punishment first confronted Professors Harry Kalven, Jr. and Hans Zeisel in 1954 in their earlier work on the Jury Project. They were studying the Blue Ribbon Jury, then still in operation in New York.¹ Analyzing the operation of such a specially impanelled jury led them to reflect on practices in

¹ It was repealed by Section 3 of Chapter 773 of the Laws of New York of 1965.

the *voir dire* that might influence jury processes in criminal cases generally. The First Ballot Study, described in this monograph,² was devised and tested. A rough analysis of these data was made and presented as a mimeographed first draft, privately circulated. This rough draft, years later, was used by defense counsel in their briefs in *Witherspoon v. Illinois* and *Bumper v. North Carolina*, both now awaiting hearing in the United States Supreme Court.³ Requests came in for the full study on which the rough draft had been based—from the defense counsel in the two cases, of course, but also from the Librarian of the Supreme Court, the State's Attorney of Cook County, and from others. It had to be put into publishable form. And other data seemed necessary fully to deploy the argument—demographic and personal characteristics that might distinguish jurors who have scruples against the death penalty from those who do not, and information on the jury's decisional processes in cases where such scruples might be relevant.

Some of this information was readily available, some had hurriedly to be pursued. It came from several sources: from data collected over the years by two organizations, the Gallup Poll and the California Poll, as part of their regularly conducted public opinion polls; from a specially conducted Gallup Poll; and from files of the Jury Project, especially from *The American Jury* itself.

Much work had to be done by several institutions for this paper in a very short time. It is proper to name them here and to express the gratitude of the Center for Studies in Criminal Justice: the Roper Public Opinion Research Center for providing crucial data; the Gallup Poll for its collaboration on the sample poll; Marplan for some statistical computations and for the clean charts; the National Opinion Research Center for processing many of the data; the Statistics Department of the University of Chicago; the Bureau of Applied Social Research at Columbia University for untiring help in the often complicated tabulations; to the American Bar Foun-

² See below, p. 25, ff.

³ No. 1015 and 1056 of the October 1967 term. The issue is now under litigation also in many lower courts across the nation.

dation for financing this publication by their consultant, Hans Zeisel; and to the Frieda and Arnold Shure Research Funds in the University of Chicago Law School.

This study has been expedited in its publication in the hope that it may prove useful to the litigants in the two Supreme Court cases referred to, and in many other lower courts where the relationship between scruples against capital punishment and the composition of the jury is currently at issue; but it is believed that, present litigation apart, the study will be of value to the lawyer, the social scientist, and to the general reader interested in problems of law and society. With the latter's needs in mind, Professor Zeisel has sometimes provided exegesis of terms and practices that are commonplace to the lawyer; their indulgence is solicited in the cause of a wider comprehension of our not very mysterious mysteries.

Social scientists are sometimes accused of laboriously demonstrating the obvious. But prospect and retrospect may have rather different views of the obvious. The accused has for centuries "put himself upon the country" and the jury is that "country"—a microcosm of his community. If the sample of peers be biased against him, it is prejudice, it is injustice. The prejudice—the pre-judging—is now not only suspected, it is demonstrated.

NORVAL MORRIS
*Director, Center for Studies
in Criminal Justice*

TABLE OF CONTENTS

	PAGE.
Challenge for Cause	1
The Meaning of "Scruples against the Death Penalty"	7
Demographic Characteristics	11
Relationship between Attitude towards the Death Penalty and Other Attitudes	19
Bias on the Issue of Guilt	25
The Jury's Decision on the Death Penalty	35
Concluding Reflections	31

Challenge for Cause

It is the purpose of this paper to provide empirical evidence on a number of issues created by the disqualification from capital cases of jurors who have scruples against the death penalty. These issues all converge on the general problem of whether these jurors are sufficiently different in other important respects, so that their elimination raises questions about the fairness of the jury selection in capital cases.¹

At present, the jury in a capital case is drawn as a rule not from the citizenry at large but only from that section of it that has no difficulties with applying the death penalty. This is the result of a rule of law that permits removal of a prospective juror if he admits to having scruples of one sort or another against inflicting the death penalty. Such admission comes from some prospective jurors in the course of questioning prior to the trial by the prosecutor, the defense counsel and, occasionally, also by the court. This procedure goes under the name of *voir dire*² and is designed to discover whether

¹ The question has raised a good deal of concern in the legal literature. See: Robert E. Knowlton, Problems of Jury Selection in Capital Cases, 101 Pa. Law Rev. 1099, 1105-1107 (1953); Annotated, Beliefs regarding capital punishment as disqualifying juror in capital case for cause, 48 Am. Law Rep. 2d 560 (1956); Lindley R. McClelland, Conscientious scruples against the death penalty in Pennsylvania, 30 Pa. Bar Assoc. Quarterly, 2522 (1959); Walter E. Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt? 39 Texas Law Rev. 545 (1961).

² Literally "to see you speak."

a particular juror holds any views or has any experiences that might threaten his impartiality in the case.³

Such prospective jurors can be kept from serving on the jury by two types of challenges:

Peremptory challenges. To begin with, each side has the right to eliminate a certain number of jurors without giving any reason. The number of these challenges is limited, and varies by jurisdiction and by type of case.⁴

Challenges for cause. Certain relationships, views, experiences, or other circumstances with respect to a particular case are considered by the law as so likely to affect the impartiality of a juror that he is eliminated by the court "for cause." The number of such challenges is unlimited. Personal relationships to a party in the case is a prime example of such a "cause."

In all but two states, scruples against the death penalty are grounds for challenge for cause.⁵

This rule developed at a time when the jury in a capital case had no say on the sentence and decided only the question of guilt. One reason for the rule was to avoid what lawyers call nullification of the law by the jury. Whenever jurors who had scruples against capital punishment were sitting on a capital case, there was the danger that the jury would acquit a defendant of the capital charge, not because it thought him

³ In general, the discussion of jury selection criteria centers on the stages that precede the trial: the original composition of the juror list, the granting of specific exemptions, etc. The elimination during *voir dire* of jurors with scruples against the death penalty is so systematic that it could be made at one of the earlier stages. In the now defunct Blue Ribbon Jury in New York, this was in fact the procedure: only jurors who on the regular questionnaire had answered the scruples question in the negative could become members of such a jury.

⁴ In capital cases the number of peremptory challenges allowed to each side varies between 25 in Connecticut and 4 in Virginia. A few states, such as Kentucky, Maryland, New Hampshire, and others allow more challenges for the defense than for the prosecution. The number of challenges allowed in non-capital cases is normally smaller.

⁵ Iowa by common law (State v. Zee 91 Iowa 499 60 NW 119 (1894); Maryland by statute (Code Ann. Art. 51 § 8a 1867 Cum. Supp.).

not guilty of it, but because it wanted to avoid the death sentence.⁶

Most states have now tried to eliminate this danger of nullification in capital cases, by transferring the decision on the death penalty from the judge to the jury.⁷ By now, in most jurisdictions that retain capital punishment, the decision on the death penalty is made by the jury. If the jury itself has it in its power to find against the death penalty, so the rationale goes, it will see no need to hedge on the issue of guilt.⁸

Nevertheless, the law of jury selection has not changed: Scruples against capital punishment provide ground for challenge for cause in most jurisdictions, as before. The "modern" rationale for the elimination of jurors who have such scruples is that such a juror lacks an open mind with respect to the death sentence he might have to impose.⁹

The exact form in which the scruples question is put to the

⁶ The process of nullification has a long and distinguished history especially in England at the beginning of the 19th century. When English law still had the death penalty for such crimes as stealing 40 shillings or more from a dwelling house, the jury would often convict of stealing 39 shillings even if what was stolen was a five pound note. (Radzinowicz, *A History of English Criminal Law*, v. 1, p. 154 ff., 1948). But jury nullification is by no means limited to capital crimes. As was documented in *The American Jury*, the process is a more pervasive one and may occur at any point where the jury feels strongly enough about avoiding the consequences of a particular guilty verdict. (See H. Kalven, Jr. and H. Zeisel, *The American Jury*, Little Brown & Co., Boston, 1967, esp. Chapters 15 through 27.)

⁷ Knowlton, *l.c.* pp. 1102, 1105.

⁸ In 35 states it is now the jury that decides whether the death penalty is to be invoked. In Utah and Montana the jury may recommend life; in Illinois, it may recommend death. In Delaware capital punishment has been abolished, either totally, as in 10 states or, as in New York, for all crimes but first degree murder of a policeman on duty or of a prison guard by a life-sentence prisoner. As to the worldwide situation concerning capital punishment, see Professor Norval Morris, *Capital Punishment Developments 1961 to 1965*, United Nations Publication ST/SOA/SD/10, New York 1967.

All this refers to the sentencing decision at the trial. The ultimate decision is made by executive review which is mandatory in most jurisdictions (see below, p. 47).

⁹ See Annot. *l.c.* pp. 560, 571.

juror varies from jurisdiction to jurisdiction, from court to court, and occasionally even in the same trial. Sometimes it remains directed to the nullification issue:

"Do you hold scruples against capital punishment that would prevent you from a finding of guilty in a capital case?"

Sometimes the question aims only at the penalty issue itself:

"Do you have such conscientious or religious scruples against capital punishment that as a juror you would never vote for a death sentence?"

In between, there are any number of variations, all aiming at the elimination of jurors with more or less strong feelings against capital punishment.¹⁰ But whatever the specific question form, the result remains the same: the removal of a major segment from the reservoir of jurors.

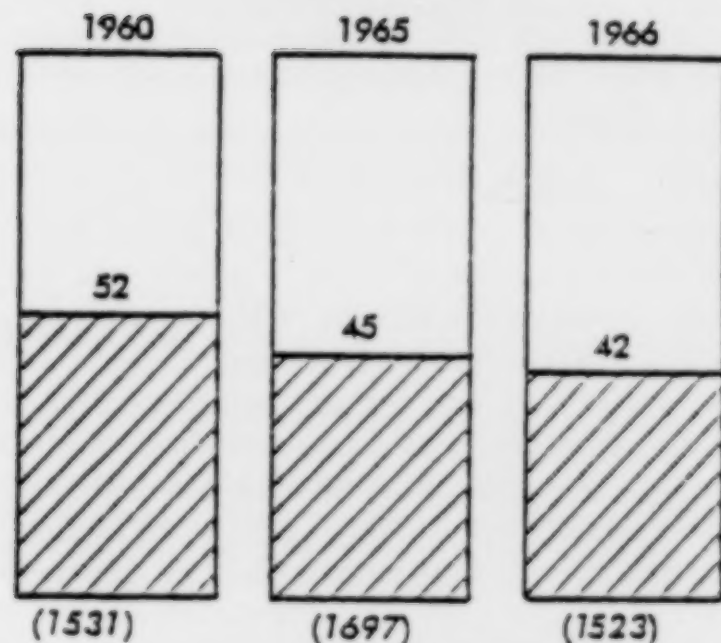
A general idea of how big this segment of the citizenry is that is thus eliminated from jury service in capital cases may be gained from the Gallup Poll which, at intervals, has been asking a representative sample of the United States population 21 years and over, a standardized question on capital punishment:

"Are you in favor of the death penalty for persons convicted of murder?"

¹⁰ See Annot. *l.c.* pp. 570 f.

Table 1 gives the results from the last three of these polls.^{10a}

TABLE 1
Percentage of the U.S. Adult Population
Favoring Capital Punishment
(Gallup Poll)



() = Number of Respondents

Table 1 shows that opinion is widely split on the issue, and that the segment of the citizenry allowed to serve on juries in capital cases is steadily narrowing.

^{10a} All measures from samples are by definition subject to error, but the magnitude of this error can be determined by standard statistical methods. For all differences reported as significant in this study, this sampling error has been determined as lying below 0.05 (read 5 out of 100 per cent), that is, odds 19 to 1 or better that this is a true difference and not one due to the chance of having drawn that particular sample.

The Meaning of "Scruples against the Death Penalty"

In spite of the variety of forms in which the scruples question is being asked, little effort has been made to clarify their respective meanings and thereby the exact relationships between them.¹¹

To make a beginning in this direction, we asked the Gallup Poll to insert the following set of questions into the nationwide poll that went into the field in February, 1963:

2a. Now, on another subject . . .

Do you have any conscientious or religious scruples against the death penalty?

1 ☐ Yes 2 ☐ No

IF YES, ASK:

b. (HAND RESPONDENT CARD A). Here are three statements. Please read them and tell me which comes closest to your views on the death penalty.

1 ☐ K 2 ☐ L 3 ☐ M v ☐ Don't Know

¹¹ Occasionally the judge will, as the transcripts of some *voir dire* proceedings reveal, make an attempt to clarify the question, but this is not the rule.

K

If I were a juror on a murder case, I would never under any circumstance vote for the death penalty, no matter how horrible the crime.

L

If I were a juror on a murder case, I would vote for the death penalty only if it were a horrible murder and a most terrible murderer.

M

If I were a juror on a murder case, I would vote for the death penalty only very very reluctantly, if there were no mitigating circumstances.

Following is the result of this poll of a representative cross-section of the United States population 21 years and older:

TABLE 2

The Meaning of "Scruples against Capital Punishment"

		Per Cent
Have scruples		34
Have no scruples		65
Don't know		1
		<u>100%</u>
<i>All who have scruples</i>		
(K) would never vote for the death penalty	18	[53%]
(L) only in the most terrible cases	7	[38%]
(M) only if there were no mitigating circumstances	6	
Don't know	3	[9%]
Total	34%	[100%]
Number of respondents . . . (1504)		

The scruples question, it turns out, has distinct meanings for different segments of the population. To only 53 per cent of the jurors who have scruples against capital punishment it means they would never vote for the death penalty, hence never do the one job the law insists they do, to differentiate between cases that deserve the death sentence and those that do not. To 38 per cent it means they would still be prepared to vote for the death penalty, if the case were sufficiently grave, hence would make the asked for differentiation. Nine per cent [3 out of 34] were not certain.^{11a}

What about the potential jurors who state that they have no scruples against the death penalty? They too must be assumed to dispense it with some hesitation and discretion and not indiscriminately; most of them anyway, because those among them who would not differentiate should also be open to challenge for cause.¹²

^{11a} It is of some interest to compare this 34% which the Gallup Poll reports as having scruples, with the respective percentages in actual jury venires in capital cases for which such figures were reported:

Witherspoon v. Illinois, No. 1015,	
petitioner's brief p. 5	47 out of 96 = 49%
Bumper v. North Carolina, No. 1016,	
petitioner's brief p. 4	16 out of 53 = 30%
Rebecca B. Madden,	
amicus curiae brief p. 9	11 out of 53 = 21%
Oscar Turner,	
amicus curiae brief p. 6	69 out of 131 = 53%
Average	38%

¹² In retrospect, the set of questions we designed for the Gallup Poll was, at least logically, incomplete for the purpose of the law. Also those who had no scruples should have been asked some second question such as this:

"Does this mean you would always vote for the death penalty in a case where the law allows it—or would you differentiate between cases that deserve the death sentence and those that don't?"

The trial judge in *U.S. v. Puff* did indeed ask the array on voir dire "whether if they find the defendant committed murder in the first degree, they would, under no circumstances, regardless of the evidence,

"Scruples against the death penalty" would seem in the end to cover two groups: those who would *never* vote a death sentence, and those who would vote for it with more or less hesitancy.¹³

The latter, together with the bulk of those who have no scruples, form the relevant group of potential jurors who are willing to differentiate between cases that deserve the death penalty and those that do not.

The prosecution, therefore, should not be entitled to a challenge for cause of jurors with scruples, as long as they fall into this group.

qualify their verdict by adding thereto 'without capital punishment'." (48 A.L.R. 2nd, 554, 1956). Utah, on the other hand, held that it was not error for a trial court to disallow a challenge for cause of a defendant who would consider nothing but the death penalty; 41 Utah 414, 126 Pac. 286 (1912). See also Knowlton *Le.* p. 1107.

¹³ See in this context also the study by Professor Fay J. Goldberg (note 26 below); some of her experimental subjects who had scruples against the death sentence had nevertheless imposed it in extreme cases.

Demographic Characteristics

The connection of individual background characteristics with attitudes, opinions, and decisions has been one of the major discoveries of modern social science research. To cite but one important example: the voting structure of the American electorate has been powerfully elucidated by the finding that voting is very much determined by such demographic characteristics of the voters, as the region and the size of the community in which they live, by their socio-economic status, their race, and religion.

Most attitudes towards public issues have since been found to be related to the demographic characteristics of those who hold them. There was, thus, a strong presumption that also the attitudes towards capital punishment would reveal such relationships, and we turn now to data that test this presumption.

They come from the three Gallup polls cited above in which one of the questions explored attitudes towards capital punishment. Since all public opinion polls record for each respondent certain demographic identification data, these poll data provided an opportunity to relate the attitude towards capital punishment to such demographic data as sex, race, schooling, age, religion, and income.

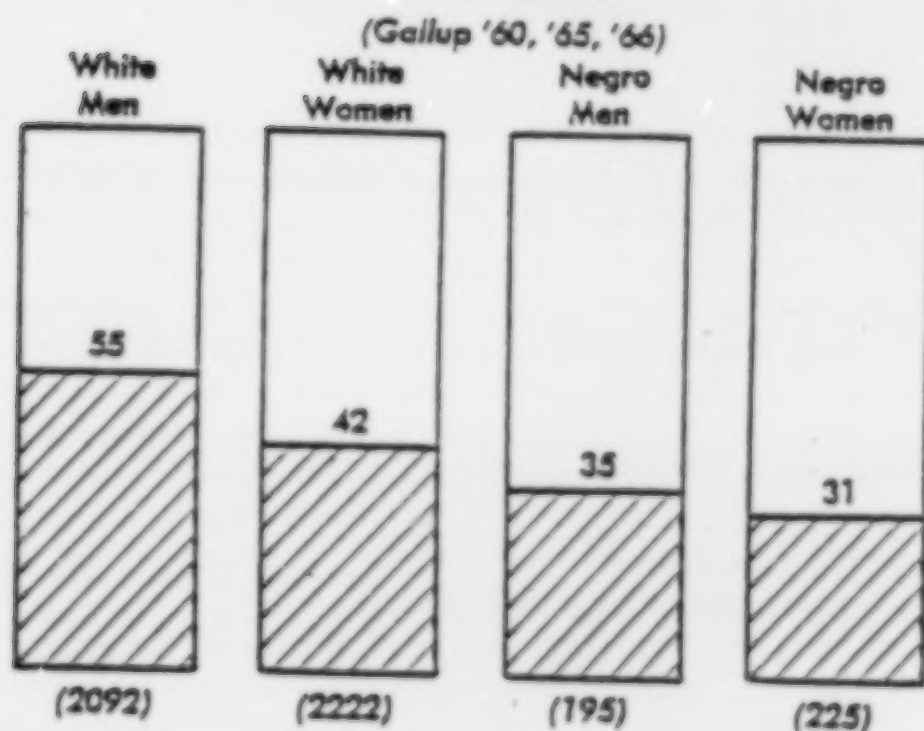
The tables that follow answer questions of the type: "Do whites and Negroes differ in the extent to which they approve or oppose capital punishment?" The "extent" is measured in

terms of the percentage who approve of capital punishment.¹⁴

We begin by presenting the relationship between attitude towards capital punishment and the respondents' sex and race.

¹⁴ Those who "do not approve," fall into two groups: those who disapprove and those relatively few who have not made up their mind. Since little additional insights are gained by giving all three percentages, only the percentages of those who approve are here reproduced.

TABLE 3
APPROVAL OF CAPITAL PUNISHMENT
BY SEX AND RACE OF THE RESPONDENT
in percentages



These are the two factors which, consistently, show the highest correlation with the attitude towards capital punishment.¹⁵

White men are more apt to approve of the death penalty than white women (55% v. 42%), and the same, although to a smaller extent, holds true for Negroes. Here too, the men show a higher rate of approval of the death penalty than the women (35% v. 31%).

At the same time, white men show a higher rate of approval than Negro men (55% v. 35%), and white women a higher rate than Negro women (42% v. 31%), indicating that more whites are in favor of the death penalty than Negroes.

Of the two factors, race differentiates more sharply, roughly twice as much, with respect to approval of the death penalty than sex:

Race Difference		Sex Difference	
	White - Negro		Men - Women
Men	55 - 35 = 20	Negro	55 - 42 = 13
Women	42 - 31 = 11	White	35 - 31 = 4

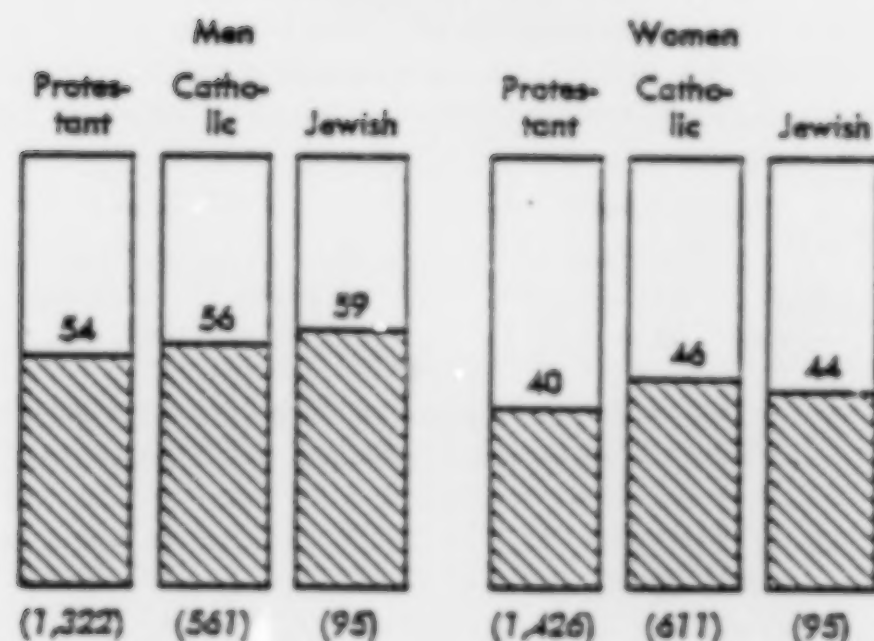
What then is the implication of these figures for the issue of juror selection? While more than half of all white men (55%) would not be subject to challenge for cause in a capital case, less than one third (31%) of the Negro women would be free from challenge.¹⁶

¹⁵ The number of respondents in this and the following Gallup Poll tables states the actual number of interviews made in the particular group. These numbers, however, do not reflect the share of the group in the total population, since the Gallup Poll weighs each group appropriately.

¹⁶ We are applying here data given in response to the question "Are you in favor of the death penalty?" to situations where the usual question is "Do you have scruples against the death penalty." To be sure the two questions are different in form but they go to the same substance and have therefore a common core. Experience with such different question forms shows that while the absolute response level may differ for the two questions, the relative differences between population subgroups, or the relationship to other attitudes remain as a rule invariant to the form of questioning. [See Paul F. Lazarsfeld, *Evidence and Inference in Social Research*, Daedalus 87 (1958) 4, pp. 99-109.] This general expectation, incidentally, is borne out in our case in the 1967

We turn next to two factors, religion and age, that reveal, perhaps somewhat surprisingly, only minor relationships to the attitude towards capital punishment:

TABLE 4
APPROVAL OF CAPITAL PUNISHMENT
BY SEX AND RELIGION*
in percentages
(Gallup '60, '65, '66)



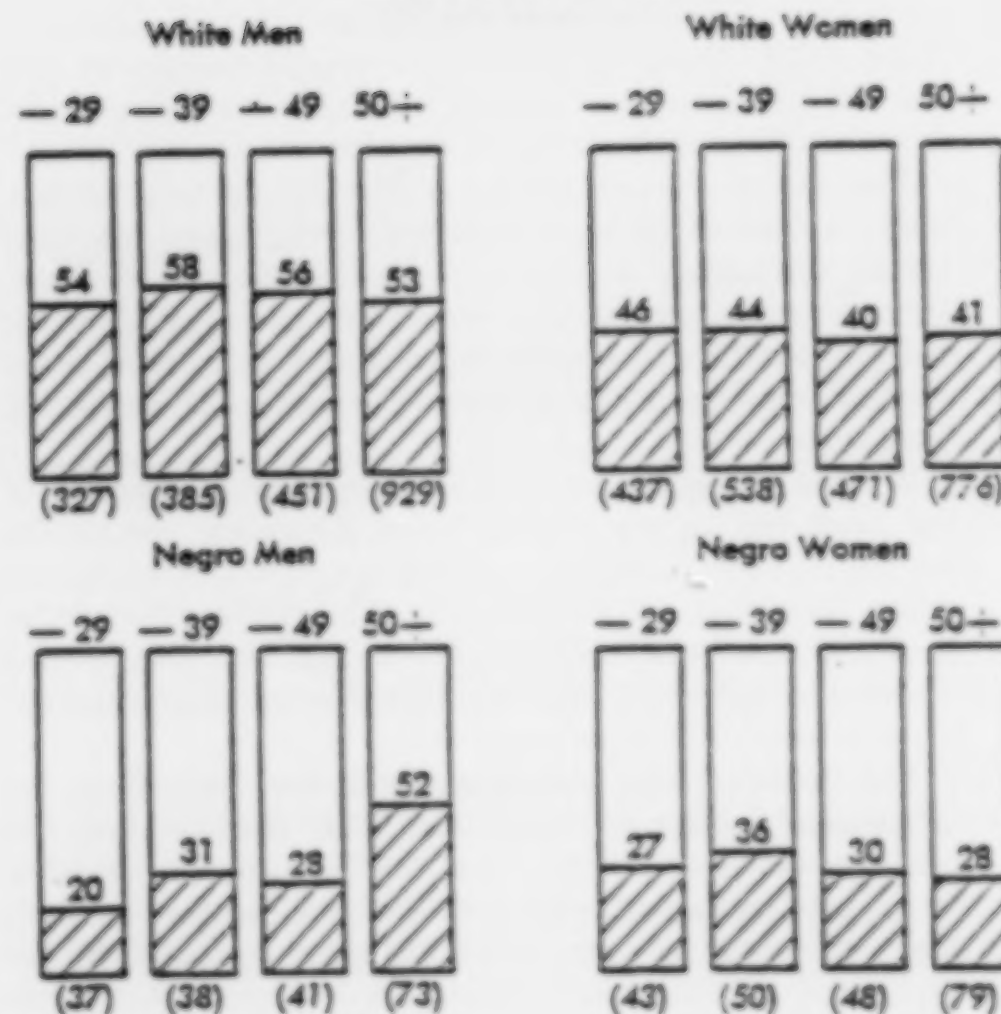
* Only whites are included in this table, since the inclusion of Negroes would have spuriously lowered the Protestant and to some extent also the Catholic percentage. Negroes, as the respective tabulations show, are not so much more against the death penalty because they are Protestant or Catholic, but because they are Negroes.

The small variations in approval do not become more explicit if one corrects for the somewhat different socio-economic structure of the three denominations.

Gallup Poll. There the question was asked in the form "Do you have any scruples?" and it provided the analogous pattern as to race and sex of the respondent:

	White Men	White Women	Negro Men	Negro Women
Per cent having no scruples	72	61	56	43

TABLE 5
APPROVAL OF CAPITAL PUNISHMENT
BY AGE, RACE, AND SEX
in percentages
(Gallup '60 '65 '66)



Age, too, with one interesting exception, appears to bear little relationship to the attitude towards capital punishment.

The exceptions are the Negro men for whom the sample suggests that there are three distinct age levels with respect to approval of the death penalty: 50 per cent approval among the old, around 30 per cent among the middle aged, and 20 per cent among the 21-29 years old. The interesting and unanswered question is whether "age" here denotes getting

older, or whether it denotes belonging to a different generation. The absence of a similar age trend among the whites make the latter interpretation more probable, especially in view of the rapid changes that are taking place in the Negro community. The very name the community gives itself emphasizes the change in generation: elderly people are still heard to talk about the "colored folks"; the middle aged ones about the "Negroes"; for the young ones, the name is "black."

The last two factors, income and schooling must be analyzed simultaneously because they are interrelated, not only among themselves, but in our population also with age. Poorer people are on the whole less educated than the wealthier ones; and the younger people, while they are better educated than the older generation, have on the whole less income.

We had to determine, therefore, the level of approval of the death penalty for a great many subgroups: for all the ($4 \times 3 \times 3 =$) 36 combinations of four age groups, three income groups, and three educational levels. The age figures could be presented independently because it turned out that, even if analyzed in such detail, the relationship to capital punishment is not substantially altered.

The following two tables summarize our findings on the influence of income and education. They comprise only the white population, since the size of our Negro sample—roughly 10 per cent of the total—did not allow such detailed analysis. The percentages in these tables, in order to reflect the independent analysis of each factor, are averages of the corresponding percentages in the above mentioned 36-fold table.¹²⁶

¹²⁶ See Zeisel, *The Cross-tabulation Explains*, in *Say It with Figures*, 4th ed. Harper & Row 1957, pp. 208 f.

TABLE 6

APPROVAL OF CAPITAL PUNISHMENT
BY INCOME (\$) AND SEX
in percentages
(Gallup '65, '66)

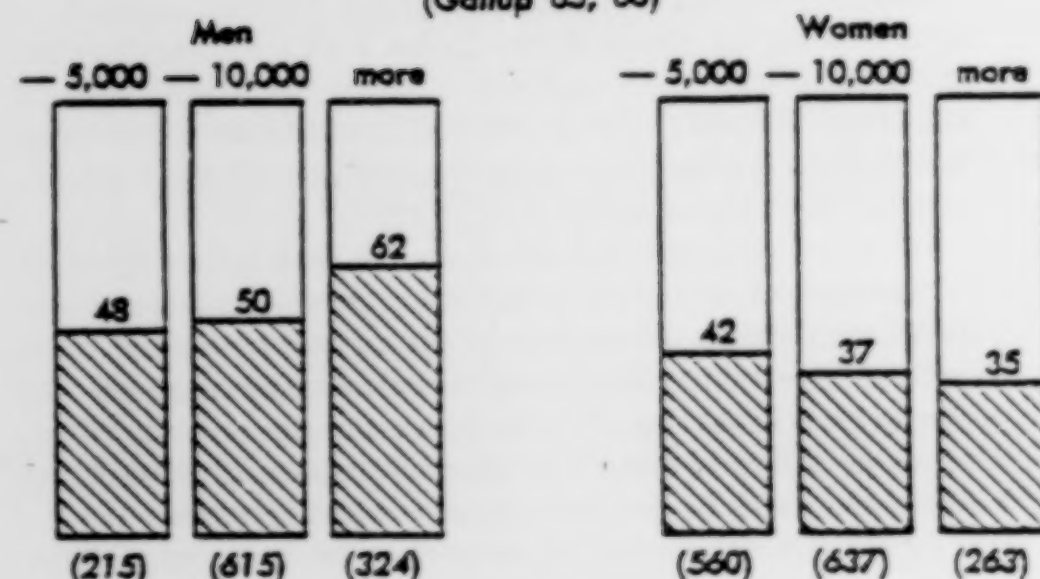
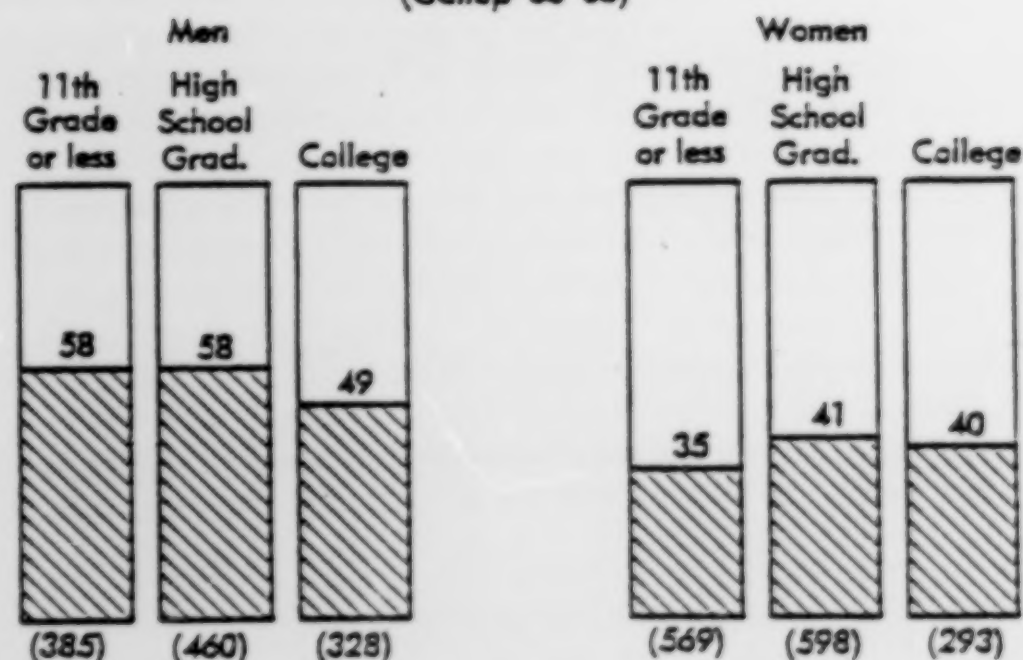


TABLE 7

APPROVAL OF CAPITAL PUNISHMENT
BY SCHOOLING AND SEX
in percentages
(Gallup '65 '66)



Among men, approval of the death penalty grows with rising income, and declines with higher education. Among women, whatever relationships appear are less marked; a somewhat higher approval rate in the lowest income bracket, and a somewhat lower approval rate on the lowest level of schooling. Women, it would seem are less influenced by these factors: they are less likely to favor capital punishment, simply because they are women.

What emerges, in summary, from this data is that approval or disapproval of capital punishment is *not* homogeneously distributed among all sections of the citizenry; some of these sections have a very high level of approval, others a very low one. Even among the very rough groupings in our tables, approval varies between 62 per cent, among the wealthier white men, and 20 per cent, among young Negroes.

As long as the law allows challenge for cause of all who have scruples against the death penalty, it is bound to remove from the various subgroups of the citizenry segments that are very different in size: more of the college educated men; more of the men in the lower income brackets; fewer women in the low income bracket, more of the less educated women. But mainly, this automatic challenge is bound to remove many more Negroes than whites, and more women than men.

Relationship between Attitude towards the Death Penalty and Other Attitudes

So far, we have tried to answer the question as to whether attitude towards capital punishment is related to some of the more common demographic characteristics. We have found that such relationships do indeed exist, thus raising the expectation that differences would also emerge with respect to attitude syndromes, of which the demographic characteristics are rough indicators.

We now take this second step and explore the relationships that can be found between attitude towards the death penalty and other attitudes in the general area of values that might come into play when jurors are making up their minds.

Again, the data for this analysis were not gathered for the purpose of this investigation, but had been collected earlier in a neutral context. The public opinion polls cover, as a rule, a wide variety of questions; and normally there is no intent to connect any of them with each other. But at some later point, such connections may become relevant, as in the present context. Thus we searched the three Gallup Polls and the four California Polls in which respondents had been asked about their attitude on capital punishment for such other questions that could become important in situations where these respondents might serve as jurors. Since the bulk of public opinion poll questions deals with elections and other political issues in the narrow sense of the term, one

cannot find many such questions. Nevertheless, there were five, close enough to the general area of values that might influence a juror's decision. They cover attitudes towards the following topics: gun registration, John Birch Society, open housing law, racially mixed neighborhoods, and abortion laws. Specifically, the questions asked were these:

- Would you approve or disapprove of a law which would require every citizen who owns or buys a gun to register the gun with law enforcement agencies?
- Do you personally approve or disapprove of the John Birch Society?
- As you may know, the Rumford Act passed by the 1963 California legislature has become law again as a result of a recent court decision. The Rumford Act makes it illegal for apartment house owners or real estate brokers to refuse to rent or sell to anyone because of race, color, or religion. Do you favor or oppose the idea of keeping the Rumford Act as a law?
- If colored people came to live next door, would you move?
- There has been a lot of public discussion lately about abortion laws. Under present California law, abortion is legal only if needed to save the life of the mother. Some people have said this law should be liberalized somewhat to make abortion legal. If the physical or mental health of the mother might be impaired, if the baby might be born with serious deformities, or pregnancy was the result of rape or incest. Still others have argued for unrestricted legal abortion, that is that abortion should be legal whenever the mother desires it.—How do you feel about this question—are you in favor of *very restricted* abortion laws, of *liberalizing* abortion somewhat, or of allowing *unrestricted legal* abortion?

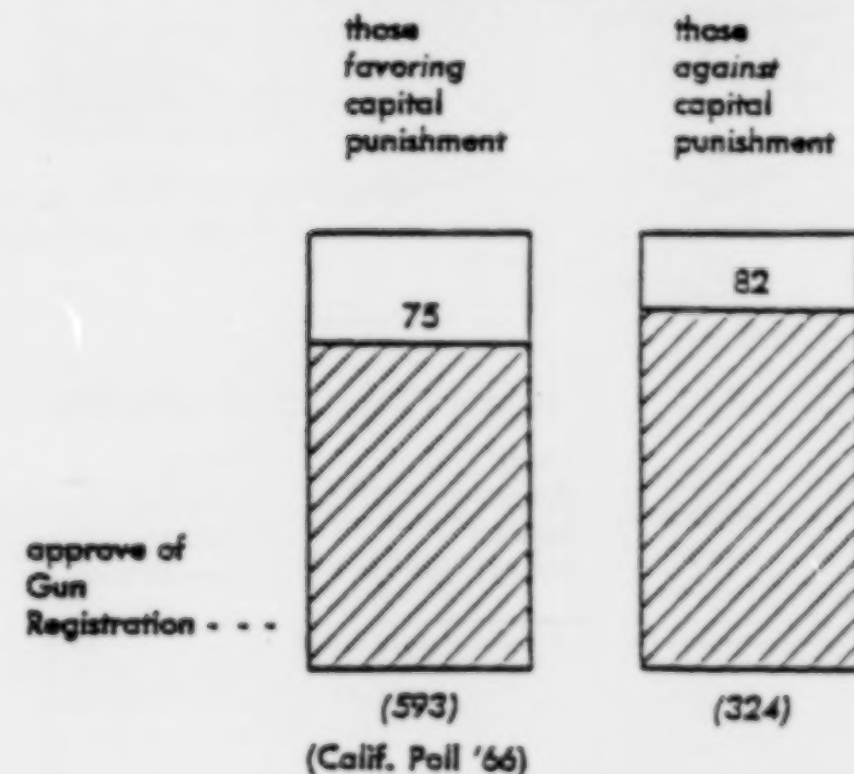
These are the five questions we could find.¹⁶ The reader

¹⁶ Survey evidence of this selective sort often contains a hidden bias, in that those relationships which failed to show the expected association are simply not reported. I hope I may be trusted to have avoided that pitfall.

might at this point care to guess with respect to each of them in which direction there will be a difference, if any, between the answers of those persons who are for capital punishment and those who are against it.

Table 8 gives the answers as they were found in these polls.¹⁷

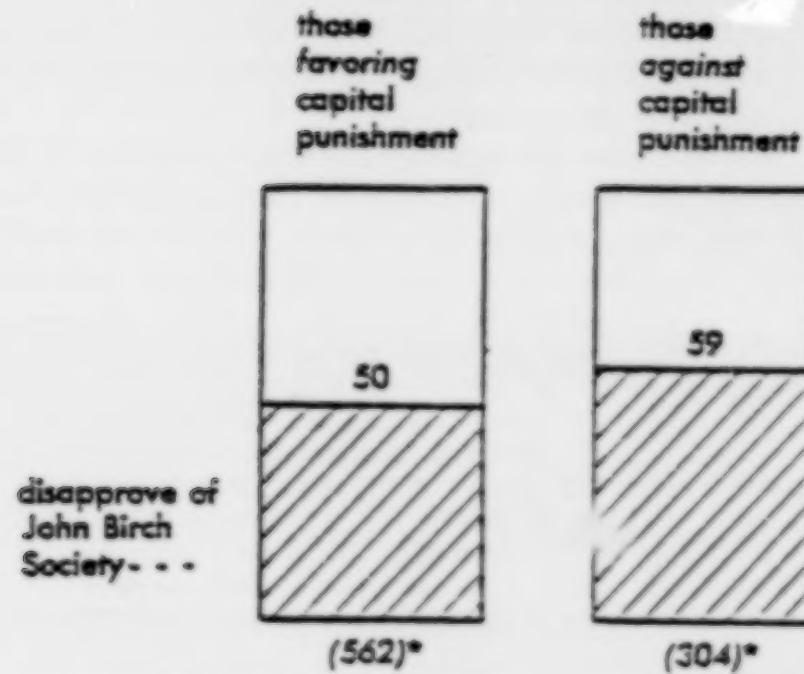
TABLE 8
ATTITUDE TOWARD CAPITAL PUNISHMENT
AS RELATED TO FIVE OTHER ATTITUDES
in percentages
1. Attitude Towards GUN REGISTRATION



(Continued next page)

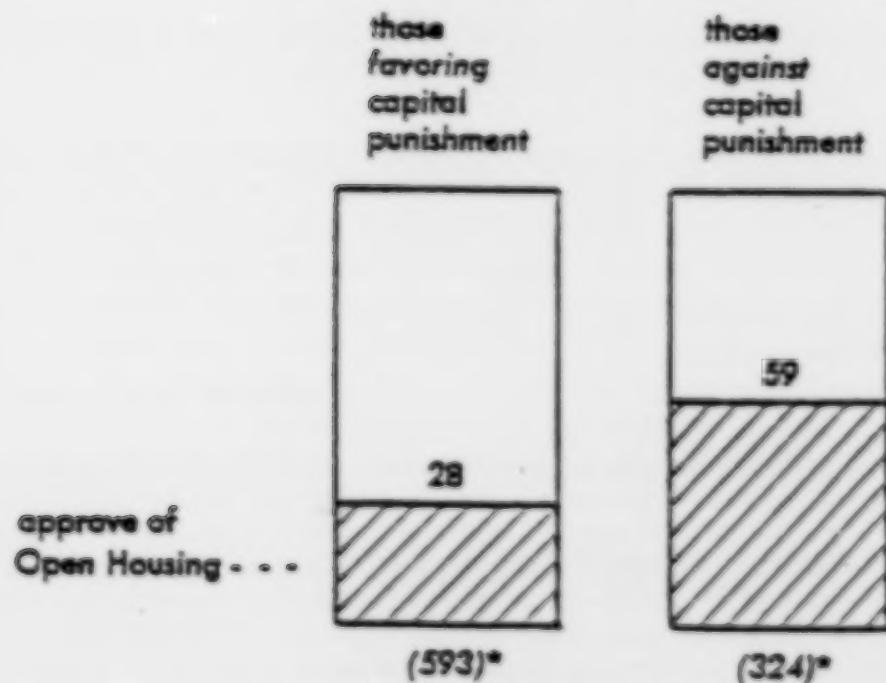
¹⁷ The two polls ask the capital punishment question in a slightly different fashion. The Gallup Poll, as mentioned above [p. 4], asks: "Are you in favor of death penalty of persons convicted of murder?" The California Poll asks: "As you know, this state has capital punishment—that is, execution—as a form of punishment for criminals. How do you personally feel about capital punishment—would you be in favor of doing away with the death sentence, or do you feel that the death sentence should be kept as a punishment for serious crimes, as it is now?" See also note 16 above.

2. Attitude Towards JOHN BIRCH SOCIETY



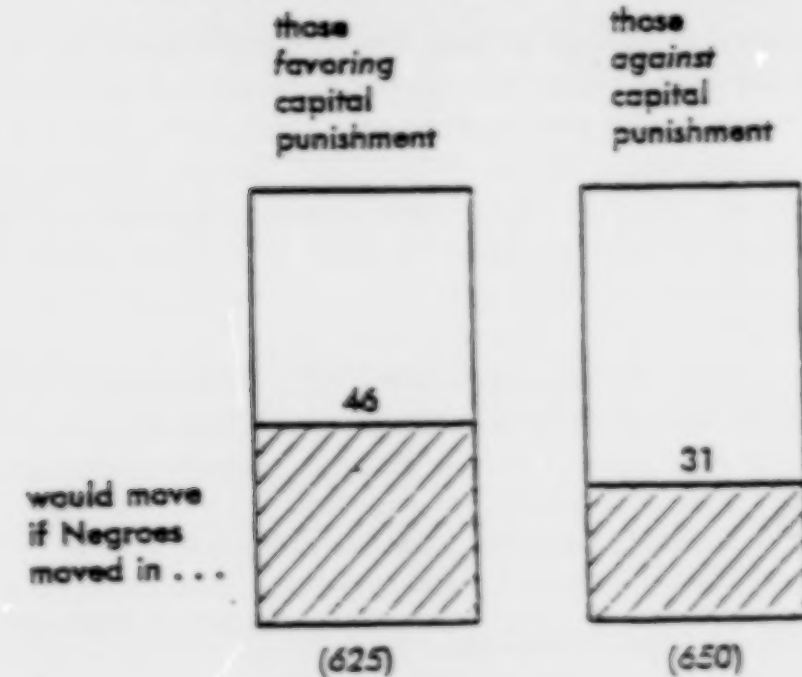
* asked only of those who knew of John Birch Society
(Calif. Poll '66)

3. Attitude Towards OPEN HOUSING



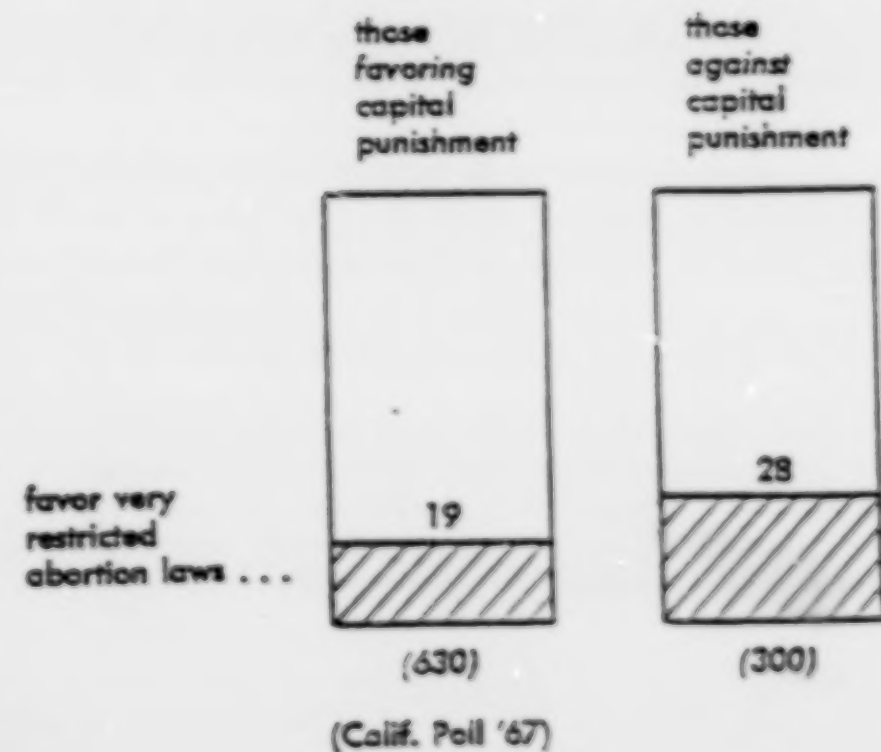
* asked of whites only
(Calif. Poll '66)

4. Attitude Towards RACIALLY MIXED NEIGHBORHOODS



* asked of whites only
(Gallup Poll '66)

5. Attitude Towards ABORTION LAWS



The answers to four of these five questions point in the expected direction. Those who favor capital punishment are less likely to approve of gun registration (75% v. 82%); they are less likely to disapprove of the John Birch Society (50% v. 59%); they are less likely to favor open housing legislation (29% v. 52%); and they are more likely to move if Negroes moved into their neighborhood (46% v. 31%). The answer to the fifth question seems to go in the opposite direction.¹⁸

This pattern of response is sufficiently directional to make it probable that attitude towards the death penalty is but part of a larger syndrome of values that are roughly characterized by being "liberal"—or being less so.¹⁹

¹⁸ We say "seems" because it is not improbable that the respondents took the word "restricted" for what it means, and not for what the poll meant it to be, namely "restrictive." See the exact wording of the question on p. 20 above.

¹⁹ This inference finds support in a study by Robert F. Crosson, who applied four personality tests to two random samples of jurors from Cuyahoga County (Cleveland) Ohio: 36 jurors who had served on capital cases and hence were "death qualified"; and 36 jurors who had served on non-capital cases and held scruples against the death penalty.

Of the four tests, only a Conservatism-Liberalism scale discriminated with high significance between the two groups of jurors. (*An Investigation into Certain Personality Variables among Capital Trial Jurors*, Ph.D. Dissertation, Dpt. of Psychology, Western Res. Univ., Jan. 1966, p. 60.)

Bias on the Issue of Guilt

We have now established that jurors who have no scruples against capital punishment differ from jurors who have such scruples in two respects: Their demographic background is different and, more importantly, also their psychological make-up, presumably connected with their background, is different.

Conceivably, we might stop here, trusting that these differences are sufficiently important to support doubts as to the propriety of the wholesale exclusion of jurors with scruples against the death penalty.

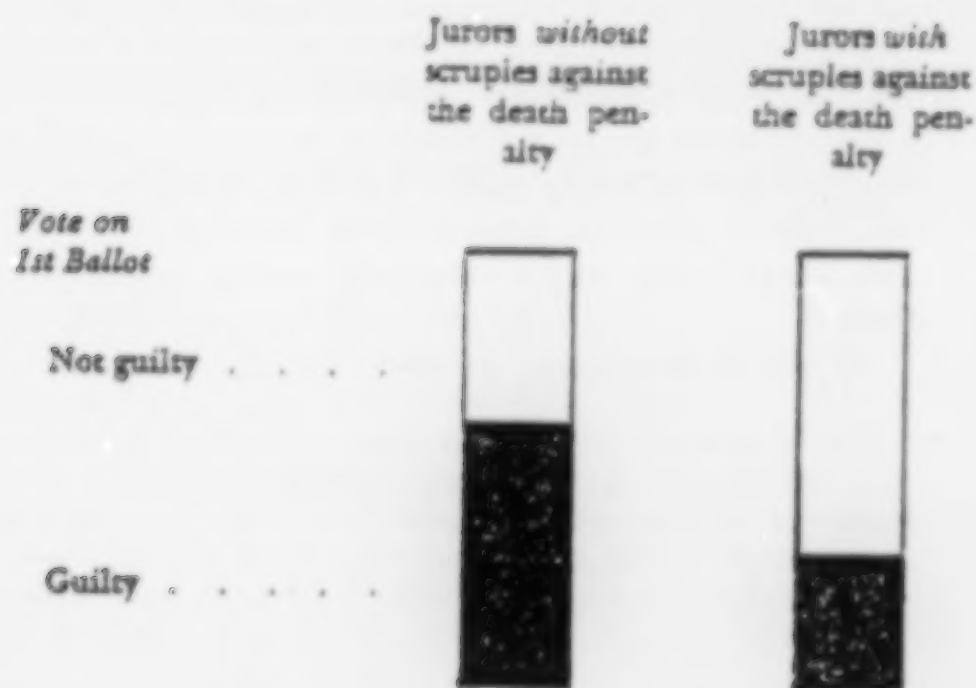
But general sociological theory would predict that people with different demographic backgrounds, holding different attitudes would also act differently on related issues. And since we have some evidence in this direction, it will be of interest to see it here, the more so since, historically, it was the first of our studies on juror attitudes towards capital punishment.²⁰

By way of introducing the study, it will be useful to con-

²⁰ See p. vi above. What follows is the greatly improved analysis of data on which I briefly reported in a preliminary manuscript, *Some Insights into the Operation of Criminal Juries*, Confidential First Draft, November, 1957. That was the manuscript which after some informal circulation found its way into a number of appeals in capital cases.

sider for a moment the ideal research design to test the hypothesis. It would look something like this: Have a very large number of jurors, say through an intercom-television set, watch a real jury trial. When it is over, determine, either by direct questioning or by asking them to deliberate in groups of 12, how they would or do vote on the first ballot: guilty or not guilty. Clearly, if some jurors should vote guilty while others voted not guilty, the conclusion would be inescapable that this difference in voting must have been caused by something that characterizes the individual juror. The conclusion is inescapable, because the case itself—the evidence, the personalities in it, etc.—was the same for all jurors: they all had seen the very same trial.

What would remain to be done is to ascertain for each juror whether or not he has scruples against the death penalty and then compare the votes of those who have scruples against the death penalty with those who have no such scruples. A result such as shown in the following hypothetical table would confirm the hypothesis:



This experiment has never been conducted. However, as a close approach to it, the following survey was made:

Over a period of several months during the years 1954 and 1955, we interviewed jurors in what were then the Criminal Court of Chicago, and the County Court of Kings County (Brooklyn).

These jurors were interviewed with permission of the presiding judge of the court on the afternoon of the last day of their term of service in the general jury room.²⁰ The jurors had been advised by the clerk that this was a study made by the Law School of the University of Chicago with the permission of the court, and that it was up to the individual juror whether he or she wanted to cooperate or refuse to be interviewed. Since no juror was asked for either name or address, the question of anonymity did not arise. As a result, very few jurors preferred not to be interviewed.

The questions asked of the jurors covered a variety of topics: some demographic characteristics, such as sex, age, the gravity of the burden which jury service imposed on them, and finally some questions that bear directly on the problem here at hand. They were asked whether they had any conscientious scruples against the death penalty, and if they had sat and deliberated on a case, they were asked these two key questions:²¹

1. How did you vote on the first ballot after the jury started to deliberate?
2. How did the entire jury vote on this first ballot?

²⁰ Belated expressions of thanks are due to three generous friends of the Jury Project: the then presiding judges of these courts, Richard B. Austin in Chicago and Nathan R. Sobel in Brooklyn, and to Leland S. Tolman, the Director of Administration of the Courts, First Judicial Department, State of New York.

²¹ Many a prospective juror never sits on a case either because of the luck of the draw or because he has been constantly challenged. Furthermore, a juror may sit on a case but not deliberate on a verdict for a variety of reasons: a mistrial might have been declared; the defendant

How were we to evaluate such a grab bag of Guilty and Not Guilty votes on many different cases, where, most of the time, we did not even have all twelve jurors from a particular case because some of them had not been in the general jury room at the time of the interview? How were we to compare a Guilty vote in a case where the jury voted unanimously Guilty on the first ballot, with a Guilty vote that was given on the first ballot in opposition to 11 jurors who voted for acquittal?

To resolve this difficulty, it was necessary to consider these votes separately for each of the split first ballot constellations.

We grouped each vote according to whether it was given in a first ballot in which there was altogether only 1 vote for Guilty, 2 votes for Guilty, and so forth until the first ballots are reached in which there were 11 votes for Guilty. The rationale of this design is that the total number of Guilty votes cast on the first ballot is an indicator of the general thrust of the evidence. It would seem fair to compare within each of these voting constellations the votes of jurors who have no scruples against the death penalty with the votes of jurors who have such scruples. Votes in a unanimous first ballot are, of course, of no significance for our issue since such votes cannot reveal proneness in either direction.

We had left 464 votes²³ that were given in split ballots. They constitute the raw material of Table 9.

In nine of the eleven first ballot constellations, the jurors without scruples against the death penalty voted more often

may have pleaded guilty; the prosecution might have withdrawn; or the judge may have directed the jury to acquit the defendant. The cases on which jurors sat and voted comprise the normal run of cases in a criminal court of unlimited jurisdiction. Capital cases are likely to be among them; to judge by the best available nationwide statistics, they should form about 7 per cent of all these trials. See *The American Jury*, p. 41 (note 6 above).

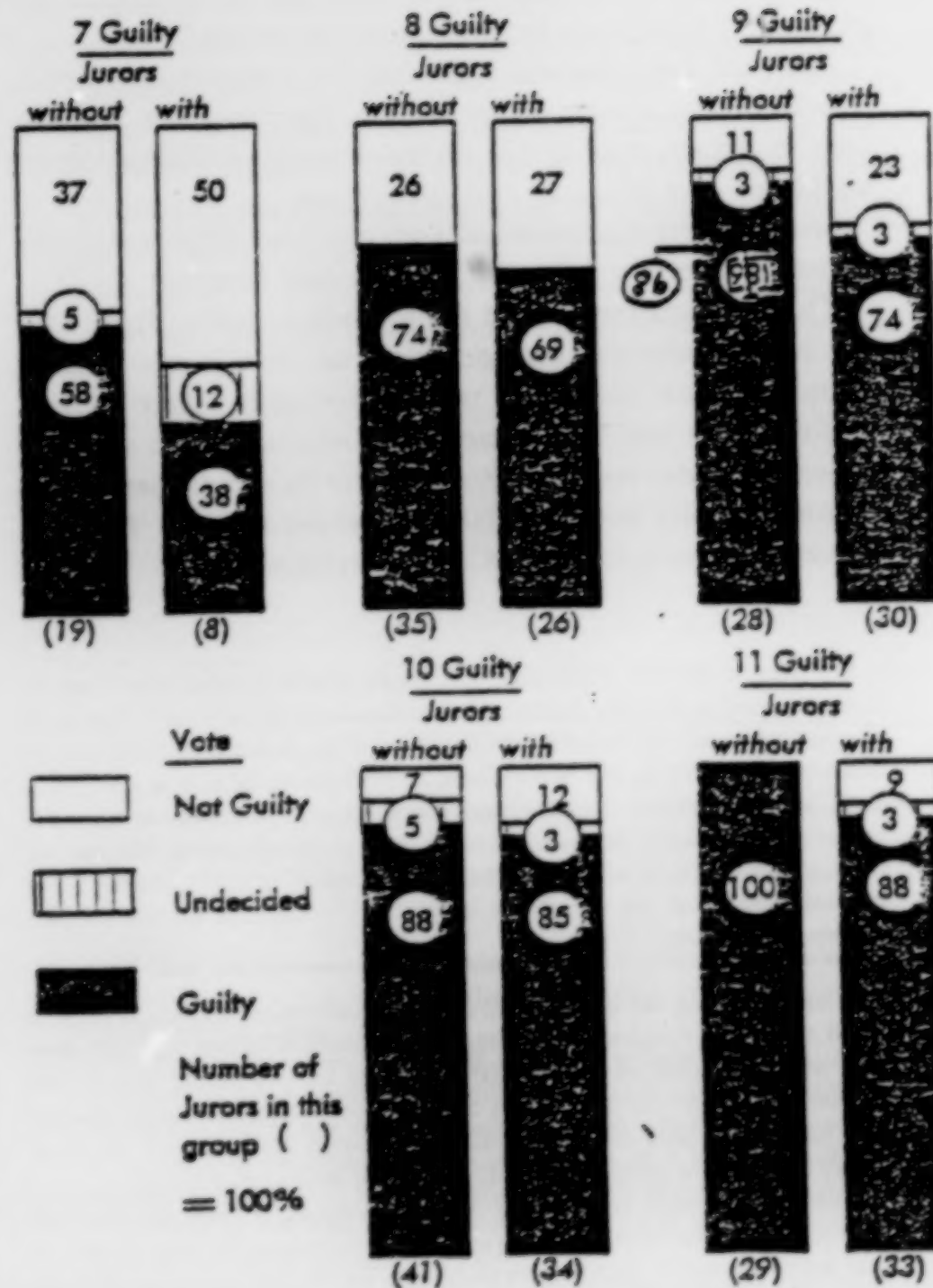
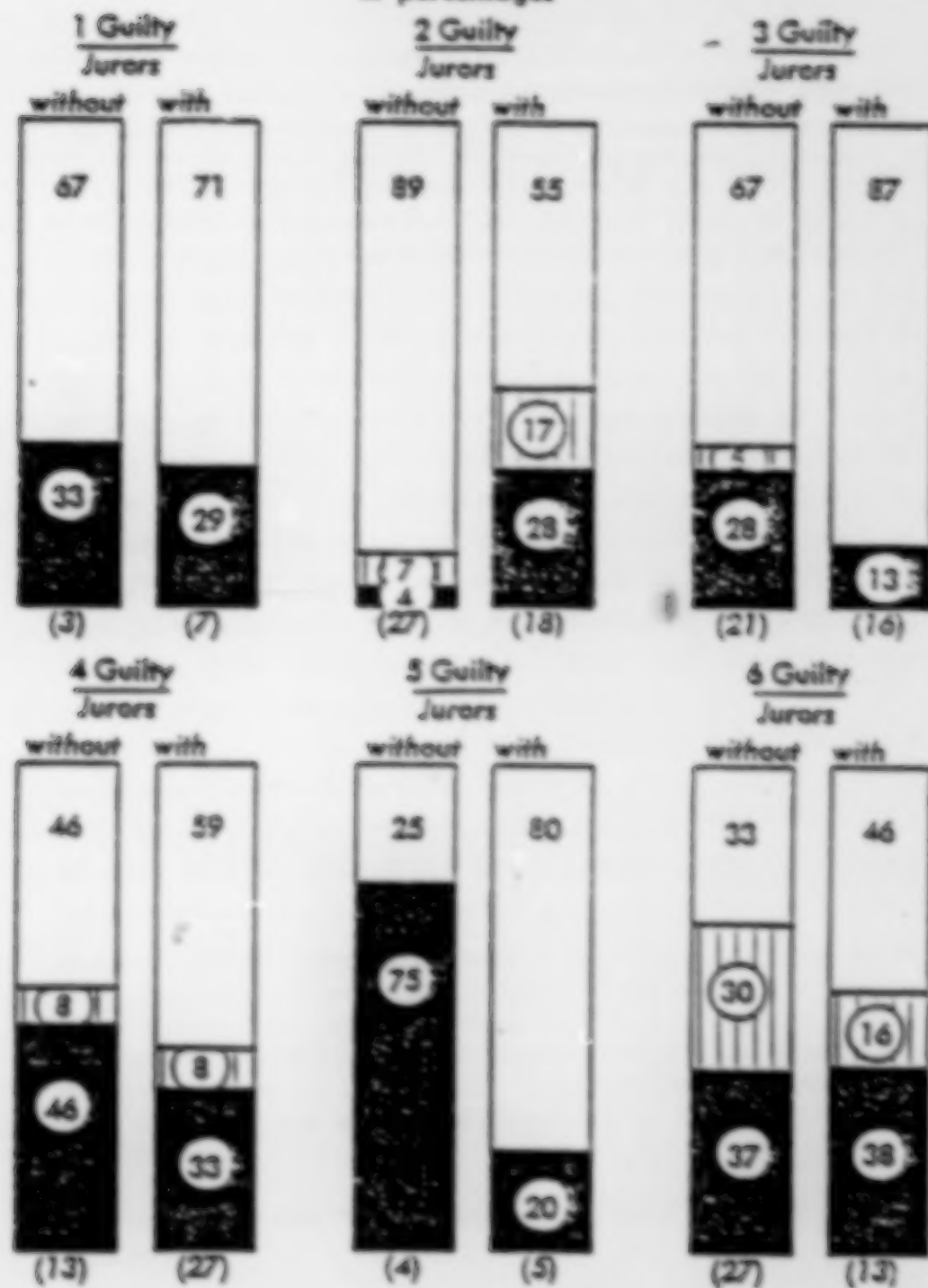
²³ Votes, not jurors, because occasionally a juror had voted on more than one case.

Guilty than the jurors who had such scruples. And, conversely, in ten of the eleven constellations, these jurors without scruples voted less often Not Guilty than the jurors with scruples:²⁴

²⁴ It should be noted, however, that another effort to connect "juror attitudes" to "juror verdicts" was not successful: Rita James Simon (*The Jury and the Defense of Insanity*, Little Brown & Co., Boston, 1967, Chapter 7) attempted to relate the acceptance of the insanity defense in her experimental jury trials to the juror's attitudes towards mental illness and psychiatry. Yet the data failed her: whether because there is in fact no connection between attitudes and verdict on this issue, or only because the trials were simulated, or because the sample was not large enough, is impossible to say.

TABLE 9

Per Cent Distribution of
First Ballot Votes of Jurors Without and With Scruples
Against the Death Penalty
in the 11 split voting constellations: 1 Guilty Vote, 2 Guilty
Votes, . . . 11 Guilty Votes.
in percentages



Vote
 Not Guilty
 Undecided
 Guilty
 Number of
 Jurors in this
 group ()
 = 100%

Following statistical conventions, we computed two measures relevant to this discussion. They are of particular importance in view of the limited size of the sample.²⁴

First, the mathematical odds that the observed differences, which for the most part go in one direction, are not due only to chance, that is, due to the vagaries of this particular sample of four hundred odd juror votes.

Secondly, the mathematical odds that the difference in the indicated direction falls within a specified interval.

This computation yielded the following results. First: odds are 24 to 1 that the statement is true, that jurors without scruples against the death penalty are more likely to vote Guilty on the first ballot than jurors who have such scruples.

Secondly, odds are 4 to 1 that the difference in the percentage points of Guilty votes will fall somewhere between 4 and 17 percentage points, in the indicated direction.²⁵

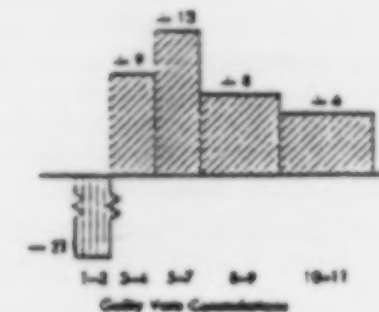
²⁴ When it became clear that this study might assume some importance, I tried to enlarge the sample by continuing the study. But both the Chicago and the Brooklyn courts turned me down this time; and so did a major court on the West Coast. A replication of this study would have been desirable, first because every unique study deserves such control; in addition, it would have helped to clarify the significance of certain anomalies in our data: the sharp reversal in the 2-Guilty-Votes constellation, and the somewhat irregular distribution of the constellations themselves.

²⁵ In appraising the significance of these differences, one must keep in mind that these computations compare the votes of jurors without scruples with the votes of jurors with scruples. In the actual world, the choice is between juries on which there are only jurors without scruples and juries on which there are both jurors with and without scruples, which is bound to lessen somewhat the above indicated differences.

There is one other point about these differences between the first ballot votes of jurors with and without scruples against the death penalty that might be worth bringing to attention. As the following graph indicates, the positive difference in percentage points is somewhat higher in the middle constellations (5-7 Guilty votes on the first ballot) where a difference of one vote might be more important than in the extreme con-

The confidence in these findings is considerably enhanced, although no numerical value can be put to it, by the confluence of evidence on this point: The jurors who approve of capital punishment have been shown to be different with respect to demographic characteristics and important evaluative attitudes that by themselves make these voting differences probable. Moreover, independently conducted simulated studies point in the same direction.²⁶

stellations, where the minority is more likely to yield to the overwhelming majority.



We had had other evidence that jurors may differ as to the amount of proof they require before they consider it "proof beyond reasonable doubt." (See *A Different Threshold of Reasonable Doubt*, Ch. 14, *The American Jury*.)

²⁶ One was conducted by Professor Faye J. Goldberg, of Morehouse College, Atlanta, Ga., and the other by Professor W. Cody Wilson, of the University of Texas.

Professor Goldberg gave two hundred college students thumbnail sketches of the evidence in 16 different simulated trials where, upon a finding of guilty, the death penalty could be imposed. Each respondent was asked to put himself into the position of a juror who is asked to decide both the guilt and the penalty of each of these trials. At the end, each student was also asked whether he had any conscientious scruples against the use of the death penalty.

A comparison of the verdicts and sentences given by the jurors who have such scruples (61%) and the jurors who have no such scruples (39%) yielded the following results [*Attitude Toward Capital Punishment*]

and Behavior as a Juror in Simulated Capital Cases, unpubl. manus., no date]:

	Jurors with scruples against the death penalty	Jurors without scruples against the death penalty
Find the defendant— guilty	69%	75%
guilty of first- degree murder	41%	48%
not guilty by reason of insanity	14%	9%
impose death sentence or life imprisonment if defendant is found guilty	58%	73%

Professor Wilson gave 187 students a questionnaire that contained among other things thumbnail sketches of the evidence in six simulated capital crimes, with the request to indicate for each whether, if he were a juror in the case, he would find the defendant guilty. The number of guilty findings (from 0 to 6) was then taken as an index of the propensity to convict. At another point of the questionnaire, the students were asked whether they had any conscientious scruples against the death penalty. Wilson found that the students who had such scruples gave significantly less often a "verdict of guilty" than the students who had no such scruples. [*Belief in Capital Punishment and Jury Performance*, unpubl. manus., no date.]

The Jury's Decision on the Death Penalty

As a kind of postscript, it may be useful to review some data on actual jury decisions on the death penalty. It will show the extraordinary difficulties of making the decision, both for the jury and for the judge. It will also show how the question as to who sits on the jury is of particular importance if the death penalty is at issue.

The data are part of the 3,576 trial reports that provided the main source material for *The American Jury*.²⁷ We shall, in fact, reproduce from it here part of the chapter *Decisions on the Death Penalty*.

But first we want to draw attention to an interesting peculiarity of the death penalty decision that is reflected in the pattern of disagreement between jury and judge on that issue.

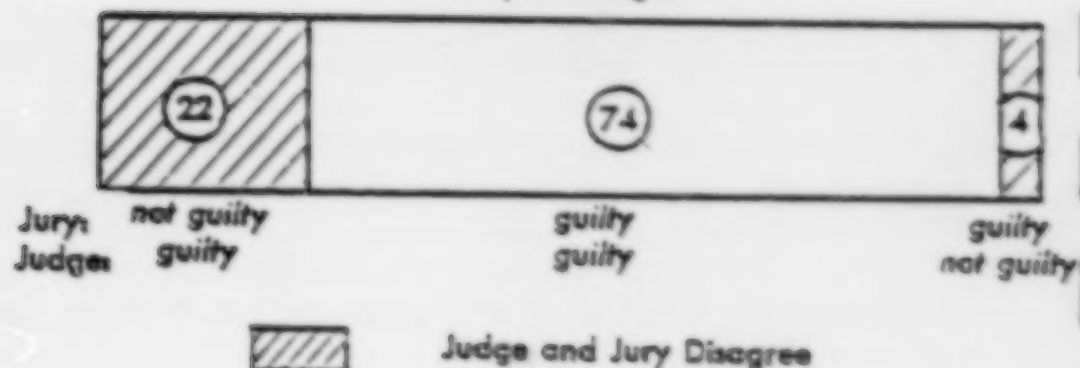
In *The American Jury* we reported that on the issue of the defendant's guilt the disagreement of the jury with the judge is on the whole a modest one. The jury will only rarely allow itself to disagree with the judge on the law, in the face of a clear factual situation. Only when the factual situation is not completely clear will the jury at times inject its sentiments and acquit where the judge would have convicted, or convict where the judge would have acquitted.

²⁷ See note 6 above.

If we look at all cases in which either the jury found the defendant guilty, or the judge would have found him guilty (including the cases in which both agree on a guilty verdict), and call these cases 100%, then the following pattern of disagreement emerges:

Table 10

*Judge-Jury Disagreement on Issue of Guilt
When either or both convict
in percentages*

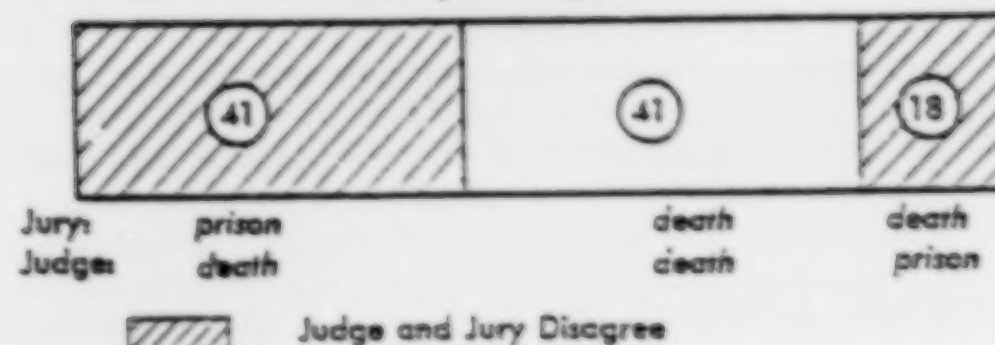


In 74 per cent of these cases judge and jury agree on conviction; in $(22 + 4 =)$ 26 per cent of the cases they disagree.

We now show the comparable table for the decision on the death penalty. We consider only those cases in which the defendant was found guilty of a capital crime and either the jury gave the death penalty or the judge would have given it. If we again designate as 100% these cases where either the jury or the judge or both imposed the death penalty, we obtain the following pattern of disagreement.

Table 11

*Judge-Jury Disagreement on the Death Penalty
When either or both impose it
in percentages*



On the death penalty the agreement is only 41 per cent; the disagreement $(41 + 18 =)$ 59 per cent.

This greater amount of disagreement should not surprise in view of the different task the jury is asked to perform here. On the issue of guilt the jury's decision, at least under the letter of the law, has the structure of a syllogism. The jury is told: "This is the law—if the facts fit it—you must find the defendant guilty."²⁸

On the issue of the death penalty, the jury is told the exact opposite: "There is no law to guide you; the decision is en-

²⁸ That the jury in fact, however, does more than to apply such syllogism has long been known and is now amply documented in *The American Jury*.

tirely in your discretion."²⁹ Hence, the notion of not obeying the law cannot arise.

An important implication might follow from this for the disqualification of jurors on *voir dire*: If the margin of disagreement between jury and judge is large—as it is on the issue of the death sentence, because every juror has considerable leeway in his decision—then the question of exactly who sits on a jury will be of even greater importance, than if the jury decides on the issue of guilt, where this leeway is smaller.³⁰

We shall look first at the individual cases to learn what we can about what moves the jury and the judge in their respective judgments. Finally, recent studies of executive clemency make it possible to round out the discussion by bringing in a third decider, the chief executive, who is as a rule called upon to make the final decision on this awesome issue. We can thus attempt a rough comparative study across these three institutions.³¹

²⁹ The law goes so far as to consider it error for the judge to give the jury any guidance as to when to choose the death sentence. See for instance: *Winston v. United States*, 172 U.S. 303, 312-14 (1899); *People v. Green*, 47 C. 2d 209, 302 P. 2d 307, 322 (1956); *Wheeler v. State*, 220 Ga. 535, 140 S.E. 2d 258, 263 (1965). There are exceptions, e.g. *Pennsylvania: Commonwealth v. Sykes*, 353 Pa. 392, 45 A.2d 43 (1946).

³⁰ Compare here also the great difficulty Rita James Simon had in her jury experiments to connect differences in verdicts on the issue of guilt with background characteristics of the jurors who rendered them; *loc. cit.* p. 98 f. (note 23 above).

³¹ What follows is part of Chapter 35 of *The American Jury*; footnote and table numbers are those of the original text.

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The cases in which jury and judge agree that the defendant should pay for his crime with his life are marked for the most part by peculiar heinousness. In many, a clear pattern emerges; there is an aspect of almost gratuitous violence. Five involve multiple victims. In one the defendant kills his wife and her brother. [I-1254] In another the defendant exterminates his entire family, although the trial is limited to the murder of his nine-year-old son. [I-0647] In a third domestic murder case the defendant comes upon his separated wife at her mother's home, kills her, and severely stabs the mother as well. [I-0366]

The theme of multiple murder is at times aggravated by the patent defenselessness of the victim. Thus there is a burglary case in which an old man and his wife are beaten to death with a tire iron:

Victim wounded a dozen times with a metal tool. Asleep in his home when aroused. [II-0861]

Another case adds still other alienating factors to the multiple victim theme: special ugliness in the tools of a murder with sexual overtones.

Defendant, a sex deviate, murdered two girls — one aged 3 years, the other 18 years. Both killings were with a screw driver. [II-0017]

Two other cases pick up the sex element; both are murders committed in the course of rape. In one, a strangulation, the judge adds that this was defendant's seventh criminal offense

of a violent nature, a fact also known to the jury. He says:

This was a violent and brutal killing, a heinous crime by a sadistic defendant. [I-1567]

In a burglary case, after the burglary is complete and almost as an afterthought, the defendant rapes and then stabs to death "with a paring knife" a woman who a few moments before had been secure and asleep. [I-0643]

Then there is perhaps the ugliest of these cases, which the judge describes as follows:

Defendant was charged with the rape and sodomy of a four and a half-year old child who was also his step-child. The penetration of the anal canal resulted in massive hemorrhage which caused shock and ultimately death ensued. [II-0095]

The mark of the beast is perhaps a little less evident in the remaining cases in which judge and jury agree on the death penalty. In one the victim is an elderly truck driver making his last trip prior to retirement. During a stop, his helper in the truck steals his receipts and shoots him while he is asleep, leaving the body in the van on the desert. [II-0085] In a second case the defendant, refused credit by a village merchant, returns with his rifle and shoots the seventy-two-year-old grocer in the back through the window of his office. [II-1126] And in a domestic murder case, where husband and wife have been separated, the judge notes with pungent brevity:

Husband killed wife. Six pistol shots, 2:30 A.M., at wife's home. [II-0740]

Finally, in a robbery-mugging case, the defendant brutally beats an elderly, crippled man, then drags him to a lonely spot in the woods where he strangles him. [II-0697]

These cases in which judge and jury have agreed on the death penalty give, at first impression, a strong sense of unity. Among cases of premeditated killing they seem to stand out as especially vicious. The trouble is that some aspects of this viciousness verge so much on the clearly pathological that the criterion loses some of its usefulness. Moreover, as we shall

see, many of the murder cases in which the judge and jury disagree on the death penalty appear no less heinous than those in which they agree.

We now turn to the cases where jury and judge disagree on the death penalty. The cases of disagreement, as may be recalled from Table 117, exceed the agreements 21 to 14.

The first group of cases involves a measure of mental and emotional instability on the part of the defendant, which falls short, however, of insanity.⁹ In the first case, where the violence is atrocious, it is the jury which is lenient.¹⁰ A twenty-two-year-old inmate of an institution for defective delinquents kills an aged guard in an unprovoked and ferocious attack. The judge tells us:

Defendant had been in one school or institution after another from the age of ten. His father and mother separated when defendant was approximately two years of age. The defendant had been an inmate of this institution for six years prior to the commission of this crime. I believe the jury reached the conclusion that, even though the defendant knew the difference between right and wrong, and even though he was not insane, nevertheless he did not possess a normal mentality and for this reason I believe the jury concluded not to impose the supreme penalty of capital punishment This conclusion, coupled with the story of the defendant's hardships during his early life, probably led the jury to conclude that despite the enormity of the crime, the defendant should not be required to suffer penalty of death. [I-1493]

A second case presents the same pattern: a crime of violence, an unsuccessful plea of insanity as the leniency-disposing fac-

⁹ See above, Chapter 25, especially note 8, on diminished responsibility.

¹⁰ The organization, as noted, here departs from that used throughout the book because often the explanation given by the judge is put in terms of the leniency-disposing factors. Moreover, historically, the problem has developed as one of making exceptions to the death penalty. And, finally, as indicated, we wish to compare the decisions of judge and jury with those of executive clemency, which, of course, are always in terms of reasons for leniency.

tor, and the jury as the lenient decider. This is the judge's description:

The defendant in this case beat and broke the neck of a young woman then cut her throat and threw her in a lake. He went then to the police, told them what he had done, and asked them to have him executed as soon as possible. His attorneys pleaded insanity. He was examined by the state authorities, and found to be sane. He pleaded insanity through his attorneys on the trial. The insanity plea was submitted to the jury. He did not take the stand, and the jury agreed as to his guilt, but disagreed as to death penalty. I automatically sentenced him to life in the state penitentiary.

The judge notes that he thinks "the defendant feigned insanity" and adds:

This was a very cruel murder. Defendant said he killed her because he loved her. [II-0492]

In these two cases the suggestion is that the jury is responding to a level of insanity or instability not sufficient to preclude a verdict of first degree murder but sufficient to avoid the death penalty. Two other cases however show how much judgment may waver when the death penalty is the issue.

In a multiple victim case, we are told:

The defendant stopped at a filling station and because of his conduct was requested to leave. Station owner approached the car owner a second time whereupon the defendant shot him and when his wife ran out defendant shot and killed her.

This time it is the judge who is lenient. He explains:

I believe the defendant shot the husband [station owner] because he said "You damn niggers get the hell out of here," and killed the wife because his anger toward the husband was not satisfied when he shot him down. [I-0959]

The judge, who, unlike the jury, did not respond to the touch of insanity in the first two cases, does accept this sudden anger as a sufficient reason for withholding the death penalty. And the jury, sensitive to the marginal responsibility in the previous cases, is deaf to the wild anger in this one.

The final case in this cluster deals with a killing committed in the course of an armed robbery. There are two accomplices, but the defendant is the actual killer; once again there is an unsuccessful plea of insanity, and again it is the judge who is lenient. The circumstance which divides judge and jury is set forth by the judge as follows:

The conduct of defendant and his counsel was such as to antagonize the jury and in the opinion of the court caused the imposition of death penalty rather than life imprisonment. The defendant indulged in repeated outbursts of vile language and finally was handcuffed to seat and his mouth taped. At one point, defendant jumped up and threw a book at jury. Defense lawyer was entirely incompetent although of defendant's own choice — in fact defendant refused any other counsel. Conduct of defendant and his counsel was such to antagonize jury and in the opinion of the court caused the imposition of death penalty rather than life imprisonment. [I-3129] ¹¹

It is easy to see what alienated the jury here, but we can only surmise what moved the judge to leniency. Possibly, he distrusted the ability of the trial process to render fair judgment on the issue of death where the circumstances have been made so prejudicial to the defendant, albeit by his own conduct and that of incompetent counsel.

Another group of disagreement cases involves, in differing ways, situations of domestic tension. Here the context tends to belie somewhat any deliberate intent to kill. A husband and wife are charged with the murder of their four-year-old daughter, who died "after the administering of a brutal beating." The jury, which is lenient, finds only second degree murder — thus precluding the death penalty, which the judge would have given. Little background is supplied about the case, but there may be a clue in the fact that the husband pleads insanity as a defense. Presumably there was no literal intent to kill the child. The judge finds first degree murder pur-

¹¹ This case presents an extreme example of two points we have noted earlier. On the disadvantages of obnoxious language, see Chapter 30, page 382; on the alienation of the jury by counsel, see page 392.

suant to the legal rule which holds the actor liable, as if he intended it, for a death that occurs in the course of a felony.¹² In this context the jury will not accept the legal fiction of intent. Further, with respect to the wife, the jury may have been following its special form of chivalry in not imposing the death penalty on a woman;¹³ and the husband may accordingly have been the beneficiary of a desire, at least where the death penalty is at issue, to treat partners in crime with an even hand.¹⁴ [II-04791&2]

In another domestic case the defendant kills his estranged wife, whose reputation was "poor so far as marital relations were concerned." There is a record of prior abuse by the defendant of the victim, "a good looking woman." The jury is lenient, and the judge is explicit as to why:

Eternal triangle if this is extenuating. Perhaps the so-called unwritten law. [II-0418]¹⁵

In another version, a man jealous of his paramour because she tried, as the judge puts it, to "quit being familiar with him," stabbed her to death — in the daytime on a public street while she was running from him." The jury is lenient. The judge adds the following comment to the explanation suggested by the jealousy theme:

A Negro killing a Negro, that is, the jury did not attach enough importance to the value of a human life due to race. [I-1726]¹⁶

¹² The felony murder doctrine provides in general that if a death occurs in the course of the commission of a felony, or certain felonies, the crime is murder in the first degree, even if the intent was not to kill. See Perkins, *Criminal Law*, pp. 33-36 (1957).

The felony murder rule is the harshest instance of strict liability in our criminal law. See note 3, Chapter 24.

¹³ See generally, O'Donnell, *Should Women Hang?* (1956), and below note 27. See also Chapter 15, note 14.

¹⁴ Preferential treatment is discussed in Chapter 22.

¹⁵ See Chapter 16, pages 234-236, for the discussion of "eternal triangle" cases, and page 232 for the significance of evidence of prior abuse, particularly at note 17.

¹⁶ See Chapter 26, *A Note on Crime in a Subculture*.

Perhaps one other case is conveniently placed here. The body of the victim, a woman of poor reputation, is found in the desert. Her boy friend confesses to the killing. On the witness stand he boasts of his criminal reputation. This time it is the judge who is lenient because of the status of the victim. He explains:

I felt that because the victim was herself an underworld character and was guilty at least of keeping company with a person of defendant's reputation — society because of her wrongful death did not require the supreme penalty of the defendant. [I-1023]¹⁷

Other disagreement cases pick up a theme touched on in the case of the parents who beat their child to death. In each case there are partners in the crime and the defendant is not the actual killer. The felony murder rule precipitates the disagreement.¹⁸ The jury rebels at imposing the death penalty for the vicarious criminal responsibility of the defendant. One illustration will suffice. Four defendants conspire to rob a seventy-six-year-old woman in a hotel room. In the course of the robbery the victim is gagged and she accidentally strangles. The defendant has been a mere go-between in recruiting accomplices to the crime. Three of the accomplices, the judge reveals, have "been tried, found guilty of first degree murder and given life by the jury." [II-1145] There are two leniency-disposing factors: the defendant did not commit the act of violence and the death penalty had already been withheld for the partners in the crime.

¹⁷ This is an example of judicial response to a sentiment which the jury at times exhibits in a non-death case. Chapter 18, pages 232-234.

¹⁸ We had anticipated that, because of the rigidity of the felony murder rule, the jury's sense of equity would produce a broad area of disagreement. It turned out, however, that disagreement over the rule emerges only at the level of the death penalty. The American Law Institute, *Model Penal Code*, proposes to limit the felony murder rule to a rebuttable presumption, §201.2(1)(b) Tent. Draft No. 9 (1959). It is worth noting that the first step in the evolution away from the death penalty in New York was to repeal the law that made the death penalty mandatory in cases of felony murder.

A final source of disagreement is somewhat curious. In two instances the judge, when asked for his hypothetical decision "had he tried the case without a jury," refers to what he would have done had the defendant in fact waived a jury trial:¹⁹

The killing was wanton but on a plea of guilty or a bench trial, I would have spared his life. [I-3130-1]

The jury verdict of first degree murder without recommendation of mercy was, in my opinion, justified by the nature of the attempt to escape although I would have imposed a life sentence rather than invoke the death penalty if I had tried the case myself without a jury. [II-0026-1]

The waiver is apparently regarded as a gesture of cooperation warranting withholding the death penalty.

It will be helpful to summarize at this point the reasons which moved jury or judge to withhold the death penalty in cases where one of the two decided for it.²⁰

Table 118 imposes, if for a brief moment, a sense of regularity on the discretionary allocation of the death penalty. The leniency categories have a plausible ring. But the brute fact is that each time one of the factors listed was persuasive to one of the deciders, it was unpersuasive to the other. Either the judge or the jury was willing, despite the presence of the leniency-disposing factor, to have the defendant executed.

Having explored in detail the pattern of decision for our two deciders, the judge and the jury, we look now at the record of the third decider, the executive. Although commutations are seldom accompanied by published reasons, we know something about these reasons. In 1949 in the United Kingdom, the Home Office itself submitted an illuminating memorandum to the Royal Commission on Capital Punishment²¹ and there is a

¹⁹ See Chapter 2, page 26.

²⁰ Table 118 attempts to group the reasons by using previously established categories. Admittedly, in several cases the fit is not very good. Some cases, which have not been specifically adverted to in the text to avoid repetition, are included in the table.

²¹ Royal Commission on Capital Punishment, Minutes of Evidence, p. 1 (1949).

Factors Evoking Leniency in Cases Where One Decider Gives Death Sentence

	Number of Cases
Law	
<i>Diminished responsibility</i>	
Abnormal mentality, though not legally "insane"	2
<i>Provocation, anger, jealousy</i>	
Lovers, triangle	4
Neighborhood fight	1
Child-beating	2
Negro is called "nigger"	1
<i>"Worthless victim"</i>	
Underworld characters	1
Negro kills Negro	1
<i>Felony murder</i>	
Others involved did not get death penalty	7
Defendant not the actual killer	4
<i>Procedural</i>	
Trial process distrusted, because defendant's behavior prejudiced trial against him	1
Guilty plea or jury waiver would have mitigated	2
<i>Defendant</i>	
Defendant a female	2
Father cried on stand	1
<i>Counsel</i>	
Incompetent counsel	1
<i>Evidence</i>	
Prosecution witness — contradiction between first and second trial	1
<i>Unexplained</i>	2
Total Cases	21*

* Factors add to more than 21 because of multiple reasons.

fine recent study on the variety of commutation procedures in the United States.²²

It will be convenient to follow the structure of the American study, noting the analogous English materials.²³ The study

²² Executive Clemency in Capital Cases, N.Y.U.L. Rev., v. 39, p. 136 (1964).

²³ The appropriate page references are given in the text.

lists thirteen factors or standards that influenced clemency.²⁴ *The Nature of the Crime.* "[A]cts which, because of the status of the victim and the viciousness of the crime, most offend the community." "The more heinous the crime, the less chance for clemency." (p. 159.)

Doubt as to Guilt. The study says this is a less frequent basis than one might expect, because the executive is often hesitant to displace the jury as fact-finder. (p. 160.)

Fairness of Trial. "[The question] usually arises in a situation where there has been considerable publicity surrounding the trial." (p. 162.)

Relative Guilt and Disparity of Sentences. "The principle [in felony murder trials] that the acts of one shall be the acts of all, insofar as it fails to recognize relative degrees of culpability, leaves to the clemency authority the opportunity to inquire into the defendant's personal responsibility and the directness of his participation. . . ." (p. 163.)²⁵

Geographical Equalization of Sentences. "The acceptance of this standard is rooted in the belief that the locale of the crime should not dictate the severity of the sentence." (p. 165.)

Mitigating Circumstances. "The existence or lack of mitigating circumstances accompanying the commission of the crime, such as duress, provocation, intoxication and self-defense, is of some importance. . . ." (p. 165.)

Rehabilitation. "Rehabilitation appears to be a standard for commutation only in cases where the defendant has managed through court action to remain alive for a number of years after the original date of execution." (p. 168.)

²⁴ The following list gives the British counterpart, by citing the corresponding passages from the Report of the Home Office, as given in the report of the Royal Commission (see note 21 above). *Doubt*: p. 4, §21; *Trial*: p. 4, §27; *Guilt*: p. 4, §26; *Mitigation*: p. 4, §§23, 25; *Physical Condition*: p. 2, §2; *Recommendation*: p. 3, §16; *Politics*: p. 4, §27.

²⁵ The English formulation refers to cases where two or more persons were involved and "it may be right that the principal should be executed and the secondary partners reprieved [or where] the principal has escaped trial, conviction, or execution, [and] it may be expedient to reprieve the accomplices."

Mental and Physical Condition of the Defendant. "Dissatisfaction with the *M'Naghten* rule and the artificial line between 'legal' and 'medical' insanity has led more than a few clemency authorities to commute a sentence on the basis of medical insanity where the defendant had previously been judged legally sane." (p. 168.)

Dissents and Inferences Drawn from the Courts. "Certain pardon officials have given special consideration to a case where in the appellate court one or more judges dissented. . . . Somewhat similar . . . is a written opinion which, while affirming the death penalty, intimates that the case might be appropriate for the exercise of executive clemency." (pp. 170, 171.)

The Clemency Authorities' Views on Capital Punishment. "[T]he views of a clemency official on the issue of capital punishment will have some influence. . . ." (p. 175.)²⁶

The Role of Precedent. "There is generally a discernible continuity of policy in the actions of a governor within his administration and in those of a board within its term of office." (p. 177.)²⁷

The comparison of executive discretion with that of the judge and jury is suggestive. There are, of course, several points — rehabilitation, judicial dissent, political pressure, prosecutor recommendation, geographical equalization — which in the nature of things have no parallel in the judge-jury situation. But for other factors the parallelism is worth noting. Thus, heinousness offends both. And provocation, marginal insanity, the rigors of the felony murder rule, and

²⁶ "Political motives would have doomed a murderer when Sir Herbert Samuels was Secretary but might have operated to save him during the incumbency of Lord Brentford."

²⁷ The American study offers us two other bases: recommendations of the prosecution and the trial judge (p. 171) and political pressure and publicity (p. 172). The Home Office mentions in addition other possible areas of extenuation, e.g.: suicide pact survivors, p. 4, §20; physical deterioration to such a degree that the execution would not be humane, p. 4, §22; certain instances of felony murder, p. 4, §24; special consideration to females, p. 4, §28; and, finally, youth, p. 4, §29.

procedural fairness are visible leniency factors in both forums. Somewhat surprisingly, doubt as to guilt is not a salient factor in Table 118.²⁸

The empirical data about jury, judge, and the executive, however, do little to upset an a priori conviction that the administration of the death penalty today is singularly agonizing. The jurisdictions that retain it follow the same policies. There is agreement that not all of those convicted of first degree murder should be executed, and also it is a dominant policy that the legislature does not specify by a general rule any category of defendants for whom the death penalty and its execution should be mandatory. As a result the law can only leave to discretion the decision as to who is to die. The materials just reviewed show how difficult the exercise of this discretion is, whether by the jury, the judge, or the executive.

But even these techniques for locating a hard core of capital cases do not put to rest the concern about evenhanded justice. In the end the task is one of deciding who, among those convicted of capital crimes, is to die. Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes.²⁹ The discretionary use of the death penalty requires a decision which no human should be called upon to make.

²⁸ What the Home Office calls a *scintilla of doubt*, p. 4, §21, may appear substantial in the shadow of the death penalty.

²⁹ The point was made years ago with distinctive force by Professor Wechsler: "It is obvious that capital punishment is the most difficult of sanctions to administer with even rough equality. A rigid legislative definition of capital murders has proved unworkable in practice, given the infinite variety of homicides and possible mitigating factors. A discretionary system thus becomes inevitable with equally inevitable differences in judgment depending on the individuals involved and other accidents of time and place. Yet most dramatically when life is at stake, equality is . . . a most important element of justice." Symposium on Capital Punishment, N.Y.L.F., v. 7, pp. 250, 259 (1961).

Concluding Reflections

Our data show that the jurors who profess scruples against the death penalty are clearly distinguishable from the jurors who have no such scruples. They are different in background, in basic attitudes, and probably also in their voting propensity on the issue of guilt. The summary removal of these jurors therefore, raises major questions. To decide whether they reach constitutional dimensions clearly transcends our present effort and competence, but it might not be amiss to add here to the data a few clarifying reflections.

The problem of the "scrupled" jurors has two dimensions. First, there is the effect of their removal on the jury's verdict, both on the issue of guilt and on the death sentence. Second there is the problem that the scrupled jurors fall into two distinct groups: those who would never vote for the death penalty and those who would do so, provided the case were sufficiently grave.

The second problem should allow of a simple solution: the law could restrict the summary removal for cause to that part of the scrupled jurors who would never vote for the death penalty. This limited removal would still assure that only such jurors serve on a capital case who would be willing and able to distinguish between cases that deserve the death penalty and cases that do not deserve it.

But such limited removal leaves the other problem only partly resolved. Our data suggest that the continued exclusion of the hard core scrupled jurors still affects negatively the

defendant's chances for a more lenient verdict. It is likely that the absence of these hard core scrupled jurors is even more important for maintaining a balanced jury, than the absence of those scrupled jurors who would still be willing to impose the death penalty albeit only in the gravest cases.²³

Yet if these hard core jurors are allowed to sit on a capital case, it is difficult to see how one can avoid the danger of nullification.²³ To be sure, no removal whatsoever of scrupled jurors should be permitted if the case is but capital in name.²⁴

The main dilemma remains: whether to keep the hard core scrupled jurors, at the risk of nullification, or allow their exclusion at the risk of distorting the representatives of the jury and reducing somewhat the chance of some defendants of being acquitted. Our data can do no more than put the dilemma into focus. Only the law can resolve it.

In the end, the dilemma may be perceived as but one more in the lengthening list of unresolvable tensions we have learned to see as inextricably tied to the administration of the death penalty.

²³ This common sense inference is supported by the finding from the special Gallup Poll that the demographic characteristics race and sex, that distinguish so clearly between jurors without scruples and jurors with scruples, distinguish again, and in the same direction, between scrupled jurors who still differentiate on the death penalty and the hard core of scrupled jurors who are frozen on this issue.

²³ The so-called bifurcated trial, used for instance in California, is of no help here. Under that trial rule the jury decides first on the issue of guilt and then, in a second trial, on the death penalty. If the same jury decides both issues the situation is not different from the unitary trial. If, as it sometimes happens, a different jury sits on the second trial, the first jury may be tempted to nullify.

²⁴ See e.g. the case of Rebecca B. Madden, (No. 1745 in the Arizona Supreme Court). It is, however, not easy to see how such cases can be identified in advance, unless the prosecution can be required to state at the outset whether or not it will ask for the death penalty, a request that might be difficult to sustain.

EXHIBIT CH-24

PREPUBLICATION DRAFT: Do Not
Quote Or Cite Without Permission

JUROR ATTITUDES AND CONVICTION PRONE- NESS: THE RELATIONSHIP BETWEEN ATTITUDES TOWARDS THE DEATH PENALTY AND PREDISPOSITION TO CONVICT

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William Thompson

Claudia Cowan

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INTRODUCTION

The purpose of this study is to extend and replicate earlier findings (Goldberg, 1970; Juror, 1971; Zeisel, 1968; and Wilson, 1964) indicating that people's attitudes towards the death penalty are related to the likelihood that they will perceive a criminal defendant to be guilty. Previous research using a variety of subject populations and hypothetical cases has consistently shown a tendency for those who strongly oppose the death penalty to be less likely to vote for conviction than those who are not strongly opposed. Because persons with strong scruples against capital punishment are regularly excluded from serving on juries in cases where the death penalty can be imposed [*Witherspoon v. Illinois*, 391 U.S. 510 (1968)], the relationship between death penalty attitudes and tendency to vote for conviction suggests that jurors who are permitted to try

capital cases are more likely to convict than jurors representing the whole spectrum of capital punishment attitude would be. This study was designed to test that hypothesis using a method by which we could hold constant the details of a case that was to be considered by subjects acting as jurors, while at the same time reproducing the richness and complexity of an actual criminal case.

METHOD

Subjects.

The subjects were 288 adults who were eligible for jury service in California. Thirty-seven of them were recruited from the venire lists of the Santa Clara County Superior Court after having been discharged from further juror duty upon the completion of their terms as actual venire persons. Of the remaining 251 subjects, 218 were people who had responded to a local newspaper advertisement asking for volunteers for a study of "how juries make decisions," and 33 were referred by friends who had heard of the study or were subjects themselves. Each subject was paid \$10 for participating in the study.

Definition of Experimental Groups.

Our study was designed to compare the voting behavior of "death qualified" jurors (those who are now permitted to serve on juries in capital cases) on the one hand, and of "excludable" jurors on the other. Jurors were divided into these two experimental groups at the time of the initial telephone call. During that conversation we explained that if the subjects were being selected to serve on a real jury, they would be asked certain questions about their attitudes, and that when we asked such questions during the course of the telephone interview, they should answer just as they would if they were being questioned by the judge prior to a real trial. Our aim was to identify, for purposes of subject selection, that group of individuals who would be

excluded from capital jury service under the current legal standard (*Witherspoon v. Illinois*, cited above) as a result of their unambiguous statements that they would be unable to vote for the death penalty on the facts of any case. The question designed to assess the willingness of the potential subjects to vote for the death penalty was as follows:

Now assume that you have been called as a possible juror in a first degree murder trial. The prosecutor is asking for the death sentence. Since this is a case where the death penalty may be imposed, the judge will ask you certain questions about your attitudes towards the death penalty before deciding whether you should be chosen to serve on the jury.

There are two parts to any trial where the death penalty may be imposed. In the first part, the jury decides whether the person on trial is guilty or not guilty. If the person is found guilty, there is a second part—a separate trial—in which the jury decides whether he or she should get the death penalty or life in prison.

The judge will ask you this question:

Is your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?

- (a) I would be unwilling to vote to impose it in any case.
- (b) I would consider voting to impose it in some cases.

Since our research was designed to test the relationship between willingness to consider the imposition of the death penalty and juror voting behavior on guilt and innocence, we excluded from our sample all people who stated that because of their opinions concerning the death penalty

they could not be fair and impartial in determining the guilt or innocence of a defendant in a capital case. Such people would not be permitted to serve on actual juries deciding the guilt or innocence of a capital defendant for reasons that are distinct from their willingness or unwillingness to consider the imposition of the death penalty. Thus, in our initial conversation with the prospective subjects, we asked the following question, which was designed to identify these "nullifiers":

Now, suppose that you were a juror in the *first* part of the trial, just to decide whether the accused person is guilty or not guilty of the crime. The judge instructs you that in reaching your verdict you are only allowed to consider the evidence presented in court, and must follow the law as he will state it to you. If the accused is found guilty, there will be a separate trial to decide whether or not he or she should get the death penalty.

Which of the following expresses what you would do if you were a juror for the first part of the trial?

- a) I would follow the judge's instructions and decide the question of guilt or innocence in a fair and impartial manner based on the evidence and the law

or

- b) I would not be fair and impartial in deciding the question of guilt or innocence, knowing that if the person was convicted he or she might get the death penalty

Those people who chose alternative (b) were not selected for participation in the study.

After the imposition of these selection criteria, the final sample consisted of 258 death-qualified subjects and 30 excludable subjects.

Procedure.

The study was conducted on weekend afternoons in an auditorium at Stanford University. Each subject group consisted of twelve to thirty-six subjects.

Upon their arrival, all subjects were shown to the auditorium, asked to fill out the consent form and a preliminary questionnaire, and given a brief overview of the study. The questionnaire focused on background (demographic) characteristics, general attitudes towards the death penalty and toward criminal defendants, and general attitudes with respect to crime control and due process. (This scale was taken from Boehm, 1968.)

The experimenter then introduced a videotape of the case to be decided, as follows:

Now we would like to show you a video taped reenactment of an actual criminal trial. This trial took place in Boston, and nothing has been changed except, of course, for the names. You will be asked to reach a verdict based on the facts of the case and the law the judge explains to you, just as you would if you were an actual juror. We would like you to pay close attention to the testimony and the judge's instructions and to try to take the case as seriously as you would if you were actually serving on a jury. While you are listening to the case, you should not communicate with anyone else, and you should not take any notes, because we want your experience to be as much like that of a real juror as possible.

The videotape, which consisted of a reenactment of an actual homicide case based on transcripts from the original trial, lasted two-and-a-half hours, including a half-hour of judge's instructions. It was an edited version—slightly shortened for the purposes of the present study—of a tape that had been developed by Prof. Reid Hastie of Harvard University for use in his research on the effects of requiring unanimity in jury deliberations.

The actors were prepared for their roles as follows: Each actor portraying a defense or prosecution witness was provided with a summary of the facts known to the person he portrayed, and a transcript of the original testimony. The lawyers were portrayed by an actual defense attorney and an actual prosecutor, were given the materials they would have had if they had been trying the case in real life, were informed who the witnesses would be, and were asked to develop their cases as they would for a real trial. The judge was portrayed by a real trial court judge. The segment of the original videotape containing the judge's instructions to the jury, which had been based on Massachusetts law, was replaced by a new sequence in which applicable California law was given. The new instructions were derived from *California Jury Instructions, Criminal* (CALJIC 1970) and were assembled by consulting attorneys and law professors. Professor William Keogh of the Stanford Law School portrayed the presiding judge in the new sequence. Pretesting indicated that the edited tape was regarded as convincing and realistic.

As soon as the videotape had been shown, the experimenter reminded the subjects that they should not converse, distributed a verdict questionnaire, and continued as follows:

Now you've seen the whole case and heard the judge explain the law. If you were sitting on a jury, and had to vote right now, what would your vote be? Take a few moments to consider and mark your answer on the sheet that was handed out to you. This should be your own personal individual decision, so please keep your feelings to yourself and don't look to other people to see what they are thinking. Choose one of the four verdicts on the sheet: first degree murder, second degree murder, manslaughter, or self defense.

The dependent variable was simply a sheet including the four alternative verdicts.

RESULTS

The results, presented in Table 1, provide strong support for the hypothesis that death qualified jurors are more likely to convict than are jurors excludable under the Witherspoon criteria. The most direct test of this hypothesis is a comparison of the relative proportion of guilty and not guilty verdicts among the two groups of jurors. Among the death qualified jurors, 22.1% voted not guilty while 77.9% found the defendant guilty of some level of homicide. Among the excludable jurors, 46.7% voted not guilty, and 53.3% voted guilty of some offense. This difference is highly significant ($X^2_{(1)} = 7.46$, $p = .01$) and indicates that the departure from representativeness created by the process of restricting juries in capital cases to death qualified jurors only may have important negative consequences for defendants in death penalty trials.

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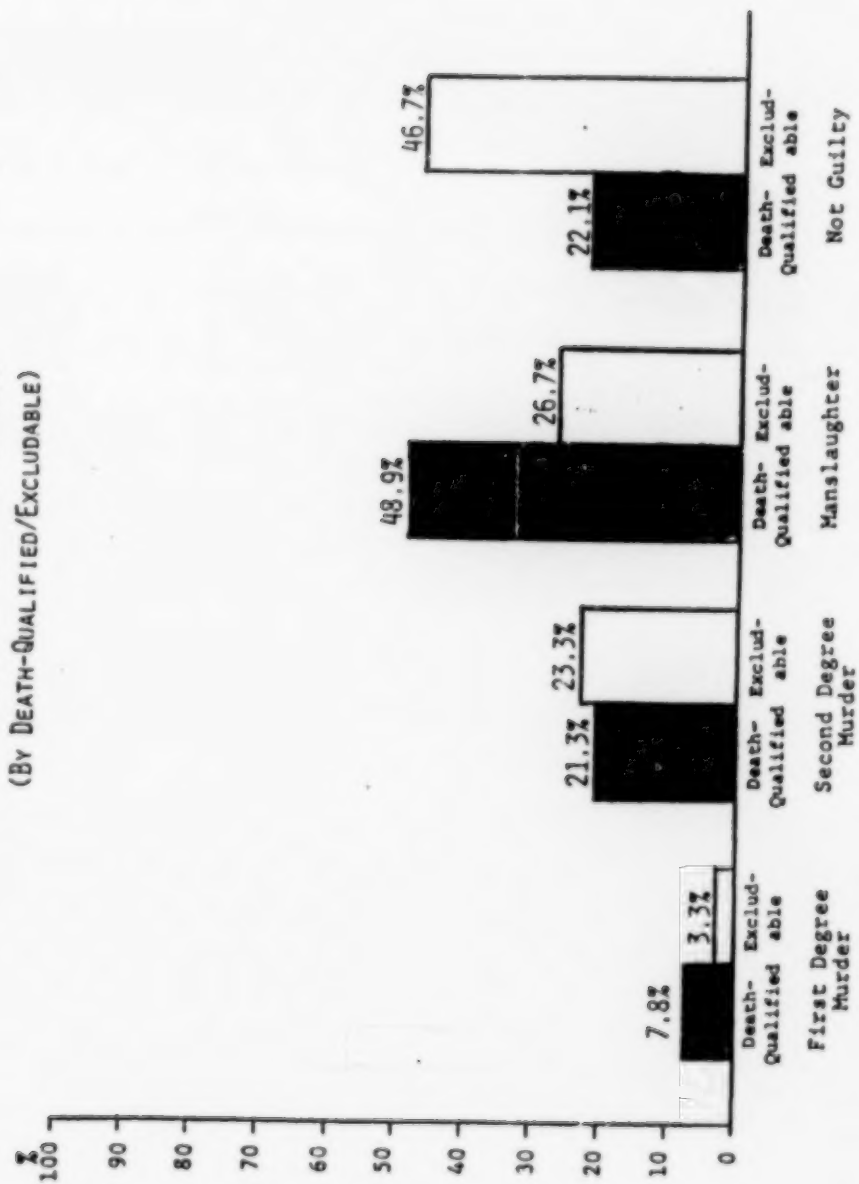
TABLE 1

JUROR VOTING BEHAVIOR, COMPARISON
OF DEATH QUALIFIED AND EXCLUDABLE JURORS

Verdict	Excludable Jurors	Death-Qualified Jurors
First Degree Murder	3.3% (1)	7.8% (20)
Second Degree Murder	23.3% (7)	21.3% (55)
Manslaughter	26.7% (8)	48.9% (126)
Acquittal	46.7% (14)	22.1% (57)
	100% (30)	100% (258)

ELLSWORTH CONVICTION-PRONENESS STUDY

DISTRIBUTION OF INITIAL VERDICTS
(BY DEATH-QUALIFIED/EXCLUDABLE)



86

EXHIBIT CH-29

87

EXHIBIT CH-30

ELLSWORTH CONVICTION-PRONENESS STUDY

PERCENT VOTING GUILTY
(BY DEATH-QUALIFIED/EXCLUDABLE)

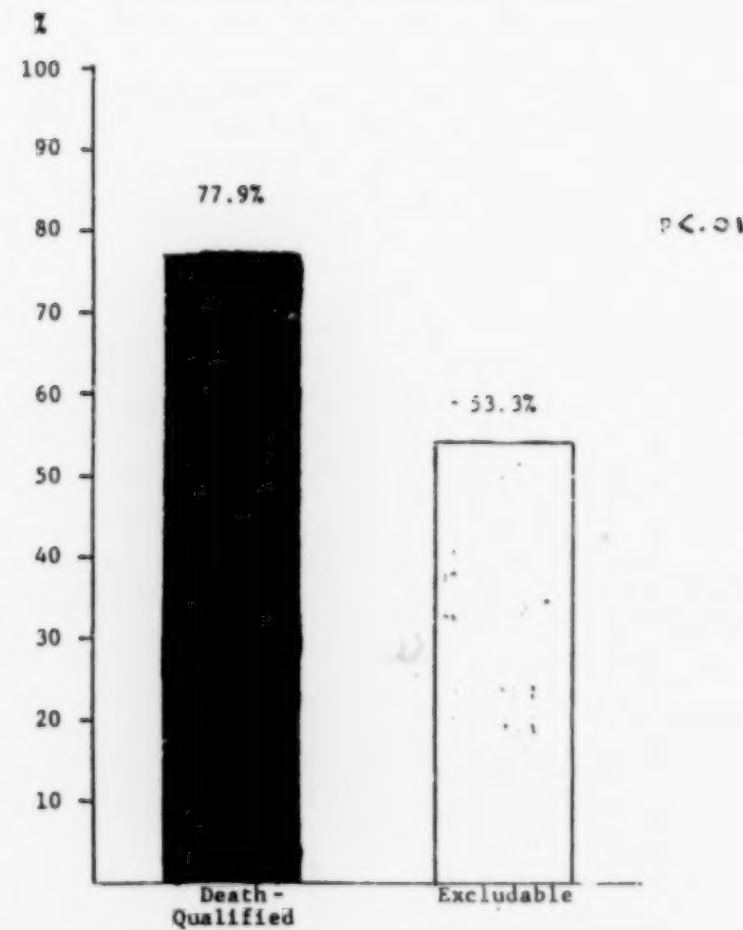


EXHIBIT CH-31

ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

AND

ELLSWORTH CONVICTION-PRONENESS STUDY

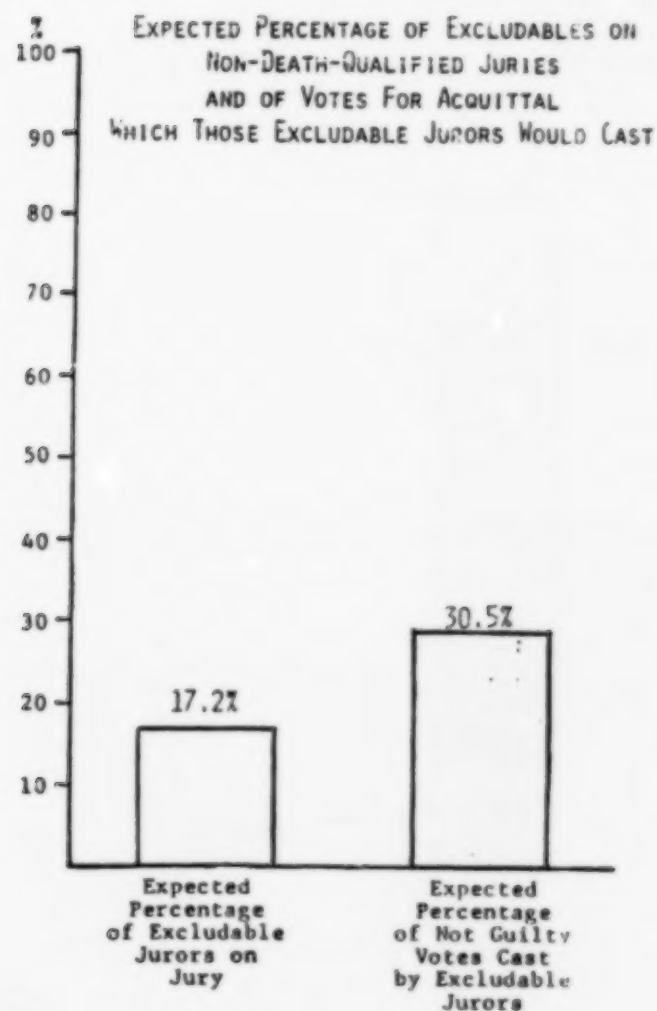


EXHIBIT CH-32

ELLSWORTH POST-DELIBERATION FOLLOW-UP DATA

JUROR VOTING BEHAVIOR, COMPARISON
OF DEATH-QUALIFIED AND EXCLUDABLE
JURORS ON POST DELIBERATION BALLOT

<u>Verdict</u>	<u>Excludable Jurors</u>	<u>Death-Qualified Jurors</u>
First Degree Murder	3.4% (1)	1.0% (2)
Second Degree Murder	13.8% (4)	17.3% (34)
Manslaughter	48.3% (14)	68.0% (134)
Acquittal	34.5% (10)	13.7% (27)
	100% (29)	100% (197)

EXHIBIT CH-33

ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

AND

ELLSWORTH POST-DELIBERATION FOLLOW-UP DATA

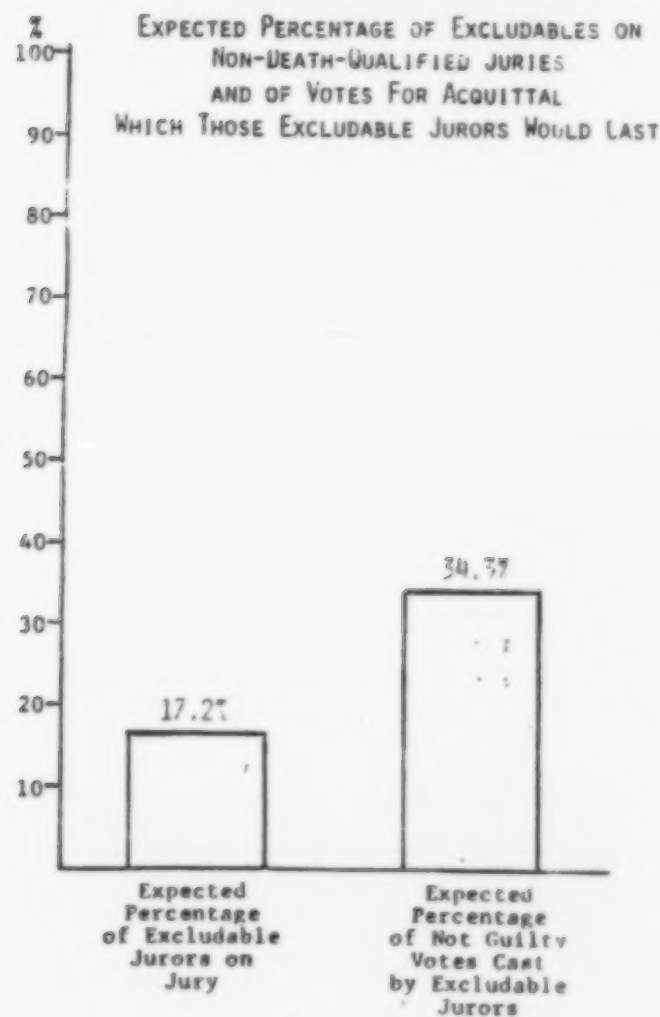


EXHIBIT CH-35

ELLSWORTH POST-DELIBERATION FOLLOW UP-DATA

Memory for Facts

Each subject was given fourteen multiple choice questions about important items of evidence from the witnesses' testimony. The tables show the mean number of questions answered correctly.

1. Comparison of death-qualified jurors who served either on mixed or on death-qualified juries, with excludable jurors.

	Number of Facts		
	Correct	Incorrect	p
Excludable Jurors	9.2	4.8	N.S.
Death-Qualified Jurors	8.8	5.2	

2. Comparison of all jurors (both death-qualified and excludable) who served on mixed juries, with all jurors who served on death-qualified juries.

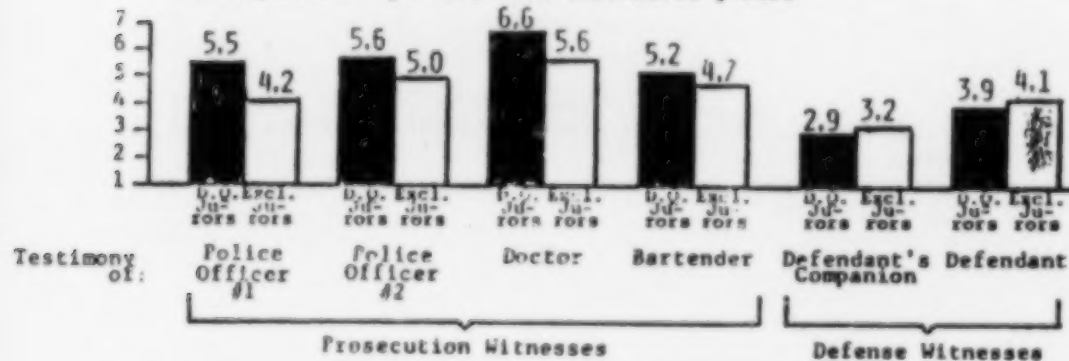
	Number of Facts		
	Correct	Incorrect	p
Members of Mixed Juries	9.2	4.8	p < .04
Members of Death-Qualified Juries	8.8	5.2	

EXHIBIT CH-36

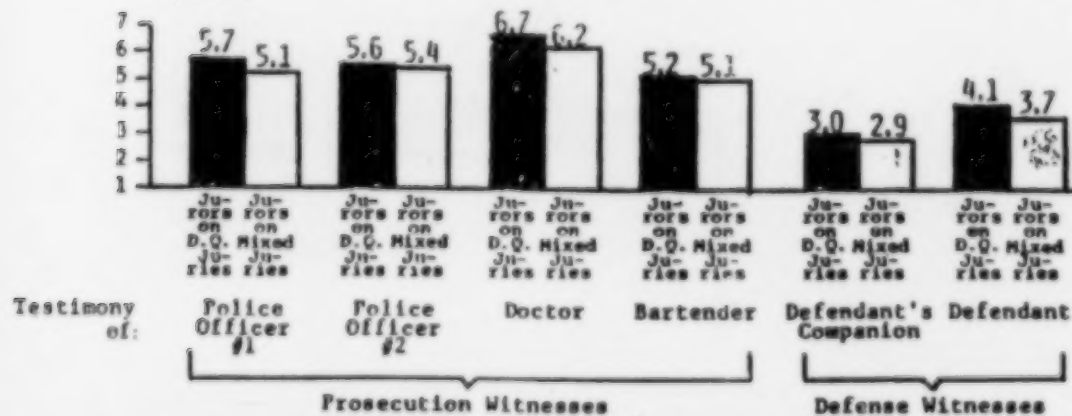
ELLSWORTH CONVICTION-PRONENESS STUDY

POST-DELIBERATION PERCEPTIONS OF WITNESS CREDIBILITY:
TWO COMPARISONS BASED UPON MEAN RESPONSES* TO THE QUESTIONS
"HOW BELIEVABLE WAS THE TESTIMONY OF _____?"

1. Comparison of death-qualified jurors who served either on mixed or death-qualified juries, with excludable jurors



2. Comparison of all jurors (both death-qualified and excludable) who served on mixed juries, with all jurors who served on death-qualified juries



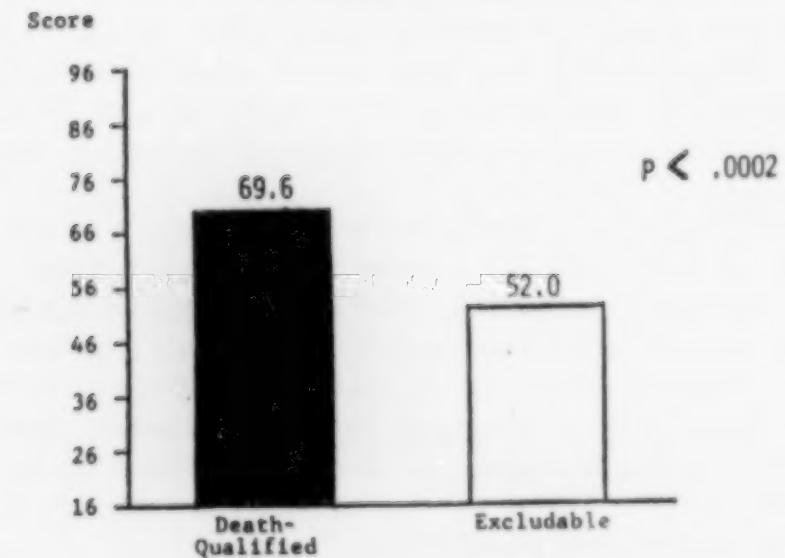
*For each post-deliberation question concerning witness credibility, as juror selected a response on a scale ranging from 1 to 7, where a response of 1 indicated that the juror found a witness "Very believable," and a response of 7 indicated that the juror found a witness "Not at all believable." The bars on this chart represent the mean responses for each designated category of respondent.

D.Q. = Death-Qualified

EXHIBIT CH-38

ELLSWORTH CREDIBILITY STUDY

INDEX OF PROSECUTION-PRONENESS ACROSS ALL QUESTIONS
PERTAINING TO WITNESS CREDIBILITY
(BY DEATH-QUALIFIED/EXCLUDABLE)



Each respondent was scored on a scale ranging from 16 to 96, where a score of 96 represented the largest possible number of pro-prosecution responses to the sixteen questions pertaining to witness credibility. The response to each question was given a score of 1, 2, 3, 4, 5 or 6, with the score of 6 assigned to the strongest possible pro-prosecution response to each question. The index given on this chart is the sum of the scores for all sixteen questions pertaining to witness credibility. The bars represent the mean index values for the death-qualified respondents and the excludable respondents.

EXHIBIT CH-39

ELLSWORTH POST-DELIBERATION
FOLLOW-UP DATA*Regret Scale*

Sometimes jurors make the wrong decision on a verdict. They might convict a defendant who is later proven to be innocent or acquit a defendant who is later proven to be guilty. Alternatively, they may convict a defendant of the wrong degree—finding him guilty of manslaughter, for example, when he actually committed second degree murder.

On this form we would like you to indicate how much regret you would feel if you were on a jury that made the wrong decision. Assume that your jury was unanimous and that you agreed with their verdict, but that you later learned your verdict was wrong. Also assume that your verdict cannot be changed or reversed. In the table below, please indicate how much regret you would feel. Use a scale of 0-100, where 0 indicates no regret and 100 indicates the most regret you could possibly feel.

How to Fill In the Table

The table below contains 16 boxes that correspond to 16 possible occurrences. In each box put a number indicating how much regret you would feel if *your jury* found the verdict listed to the *left* of the box but the *defendant* is later proven to be guilty of the verdict *above* the box. For example, in box number 7 put a number (0 - 100) indicating how much regret you would feel if your jury found the defendant guilty of second degree murder but it is later proven the defendant was only guilty of manslaughter.

The defendant is later proven to be:

	Guilty of 1st degree murder	Guilty of 2nd degree murder	Guilty of Manslaughter	Not Guilty
Guilty of 1st degree murder	1	2	3	4
Guilty of 2nd degree murder	5	6	7	8
Guilty of Manslaughter	9	10	11	12
Not Guilty	13	14	15	16

Your jury
found the
defendant:

EXHIBIT CH-40
ELLSWORTH POST-DELIBERATION
FOLLOW-UP DATA

Regret Scale

Sometimes jurors make the wrong decision on a verdict. They might convict a defendant who is later proven to be innocent or acquit a defendant who is later proven to be guilty. Alternatively, they may convict a defendant of the wrong degree—finding him guilty of manslaughter, for example, when he actually committed second degree murder.

On this form we would like you to indicate how much regret you would feel if you were on a jury that made the wrong decision. Assume that your jury was unanimous and that you agreed with their verdict, but that you later learned your verdict was wrong. Also assume that your verdict cannot be changed or reversed. In the table below, please indicate how much regret you would feel. Use a scale of 0 - 100, where 0 indicates no regret and 100 indicates the most regret you could possible feel.

How to Fill In the Table

The table below contains 16 boxes that correspond to 16 possible occurrences. In each box put a number indicating how much regret you would feel if *your jury* found the verdict listed to the *left* of the box but the *defendant* is later proven to be guilty of the verdict *above* the box. For example, in box number 7 put a number (0 - 100) indicating how much regret you would feel if your jury found the defendant guilty of second degree murder but it is later proven the defendant was only guilty of manslaughter.

The defendant is later proven to be:

	Guilty of 1st degree murder	Guilty of 2nd degree murder	Guilty of Manslaughter	Not Guilty
Guilty of 1st degree murder	1 LE (Lenient Error)	2 HE (Harsh Error)	3 HE (Harsh Error)	4 HE (Harsh Error)
Guilty of 2nd degree murder	5 LE (Lenient Error)	6 HE (Harsh Error)	7 HE (Harsh Error)	8 HE (Harsh Error)
Guilty of Manslaughter	9 LE (Lenient Error)	10 LE (Lenient Error)	11 HE (Harsh Error)	12 HE (Harsh Error)
Not Guilty	13 LE (Lenient Error)	14 LE (Lenient Error)	15 LE (Lenient Error)	16 HE (Harsh Error)

Your jury
found the
defendant:

EXHIBIT CH-41

ELLSWORTH POST-DELIBERATION
FOLLOW-UP DATADegree of Regret for Mistaken Verdicts
(By Death-Qualified/Excludable)

	Excludable Jurors (n=14)	Death-Qualified Jurors (n=15)
Regret for harsh errors (HE)*	440.0	350.9
Regret for lenient errors (LE)**	312.1	349.8
Difference in Regret	127.9	1.1
$t_{27} = 2.06, p < .05$		

*A "harsh error" means the conviction of an innocent person, or the conviction of a guilty person for a degree of homicide more severe than the "true" crime warrants. For this analysis, each juror's scores in boxes 2, 3, 4, 7, 8 and 12 of the Regret Scale were summed, resulting in a cumulative score ranging between 0 and 600. The scores given on the above table represent the mean values for the excludable jurors and the death-qualified jurors.

**A "lenient error" means the acquittal of a guilty person, or the conviction of a guilty person for a degree of homicide less severe than the "true" crime warrants. For this analysis, each juror's scores in boxes 5, 9, 10, 13, 14 and 15 of the Regret Scale were summed, resulting in a cumulative score ranging between 0 and 600. The scores given on the above table represent the mean values for the excludable jurors and the death-qualified jurors.

EXHIBIT CH-42

ELLSWORTH POST-DELIBERATION
FOLLOW-UP DATAMean Regret for Most Harsh
and Most Lenient Error

	Death Qualified	Excludable
<u>Harsh</u> Person who is innocent is convicted of first degree murder (No. 4)	68.86	90.71
<u>Lenient</u> Person who is guilty of first degree murder is acquitted (No. 13)	73.73	71.78

EXHIBIT CH-42-1

ELLSWORTH, et. al. INSANITY DEFENSE STUDY

(Percent of Death Qualified and
Excludables Voting for the Insanity Defense)

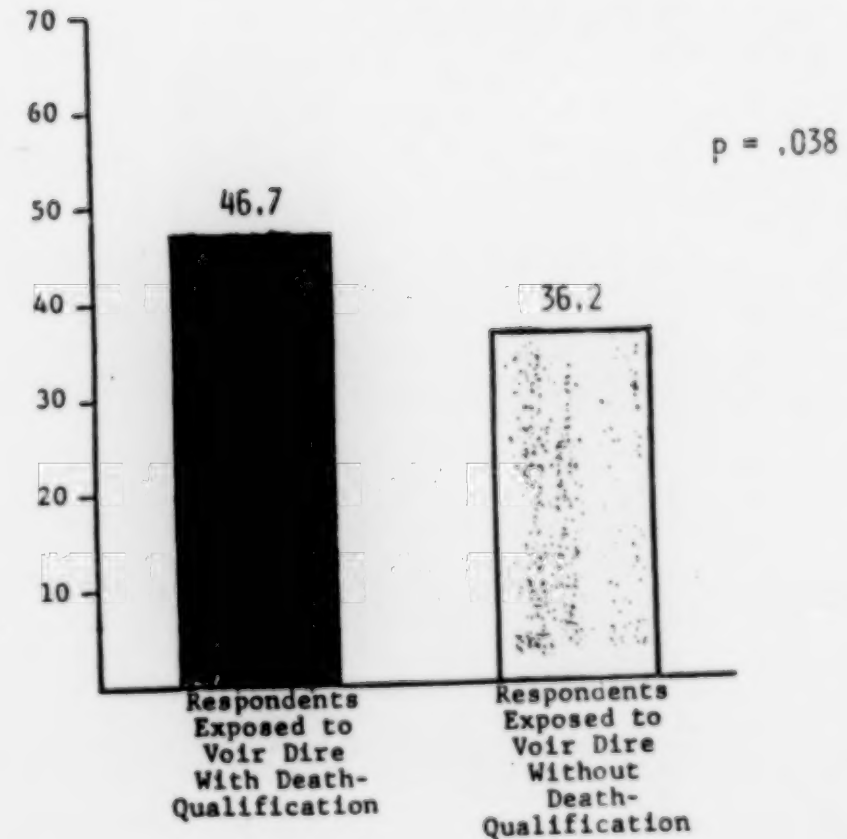
	DQ	Excl.	P
Case 1 (simple schizophrenia)	11%	44%	.025
Case 2 (paranoid schizophrenia)	16%	44%	.08

EXHIBIT CH-47

HANEY DEATH-QUALIFICATION
PROCESS STUDY

Mean Assessment of Likelihood That Defendant
Is Guilty of First Degree Murder*

(By Exposure to Voir Dire With/Without
Death-Qualification)



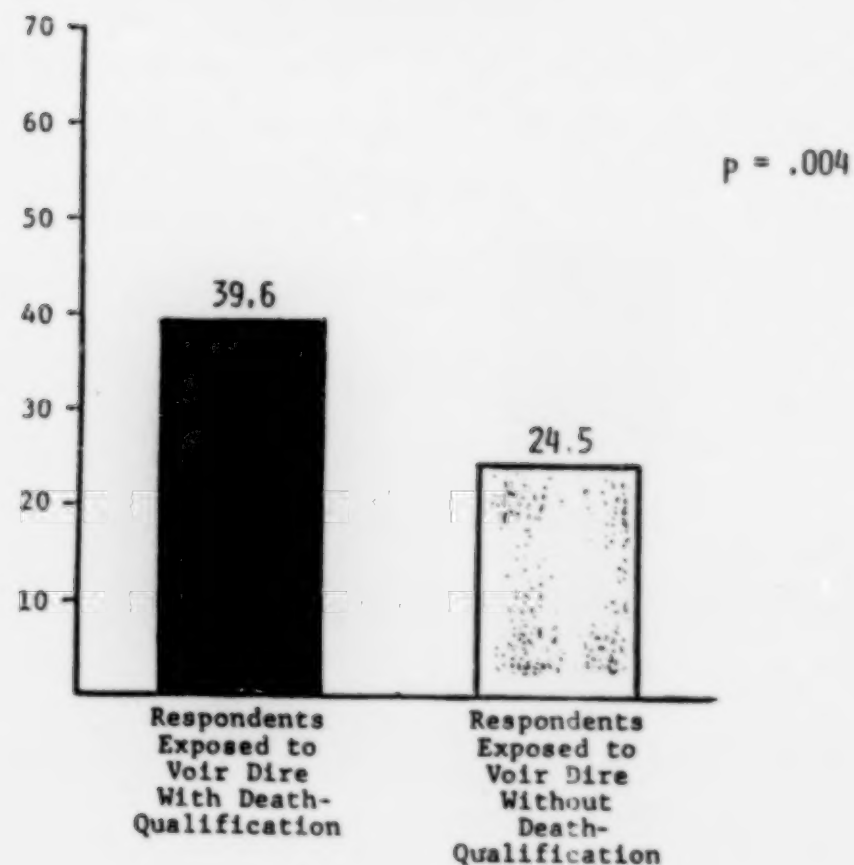
*Responses to Question No. 1.

EXHIBIT CH-48

HANEY DEATH-QUALIFICATION
PROCESS STUDY

Mean Assessment of Likelihood that Defendant
Will be Found Guilty of First Degree Murder
and Given the Death Penalty*

(By Exposure to Voir Dire With/Without
Death-Qualification)



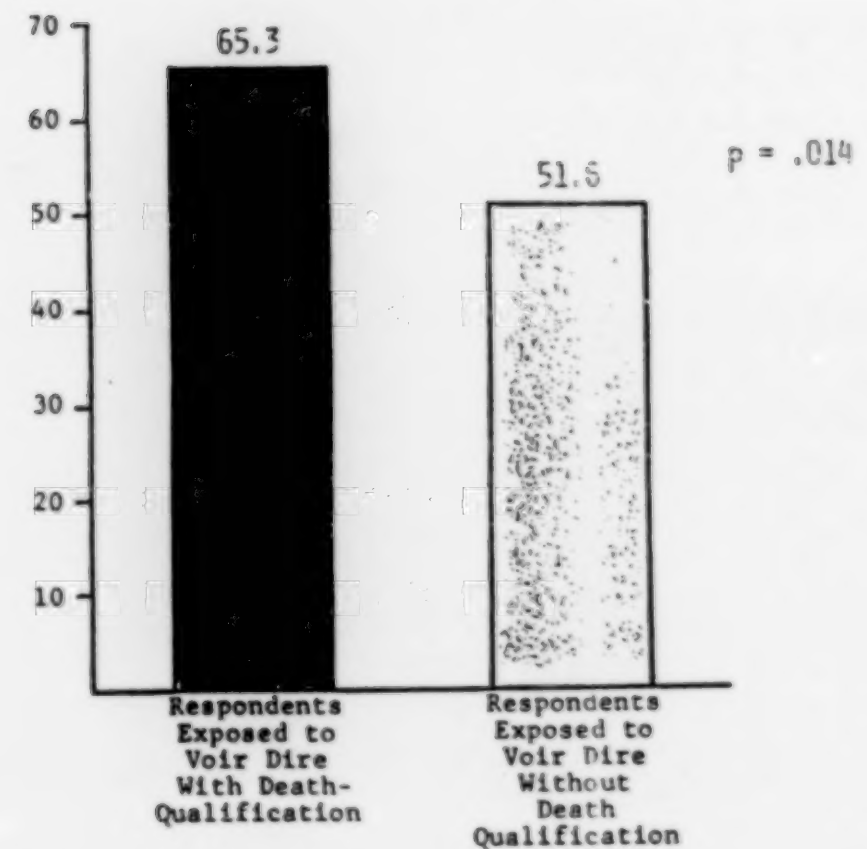
*Responses to Question No. 2.

EXHIBIT CH-49

HANEY DEATH-QUALIFICATION
PROCESS STUDY

Mean Assessment of Likelihood that Defendant
Will Be Convicted of Something*

(By Exposure to Voir Dire With/Without
Death-Qualification)



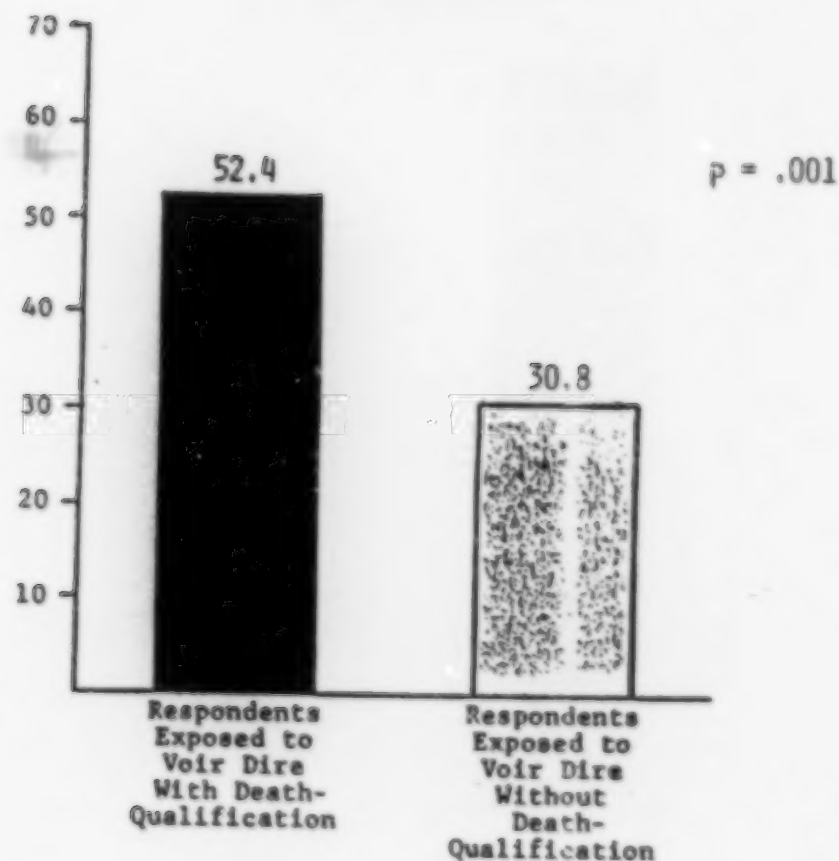
*Responses to Question No. 3.

EXHIBIT CH-50

HANEY DEATH-QUALIFICATION
PROCESS STUDY

Mean Assessment of the Degree to Which the
Law Disapproves of People Opposed to the
Death Penalty*

(By Exposure to Voir Dire With/Without
Death-Qualification)



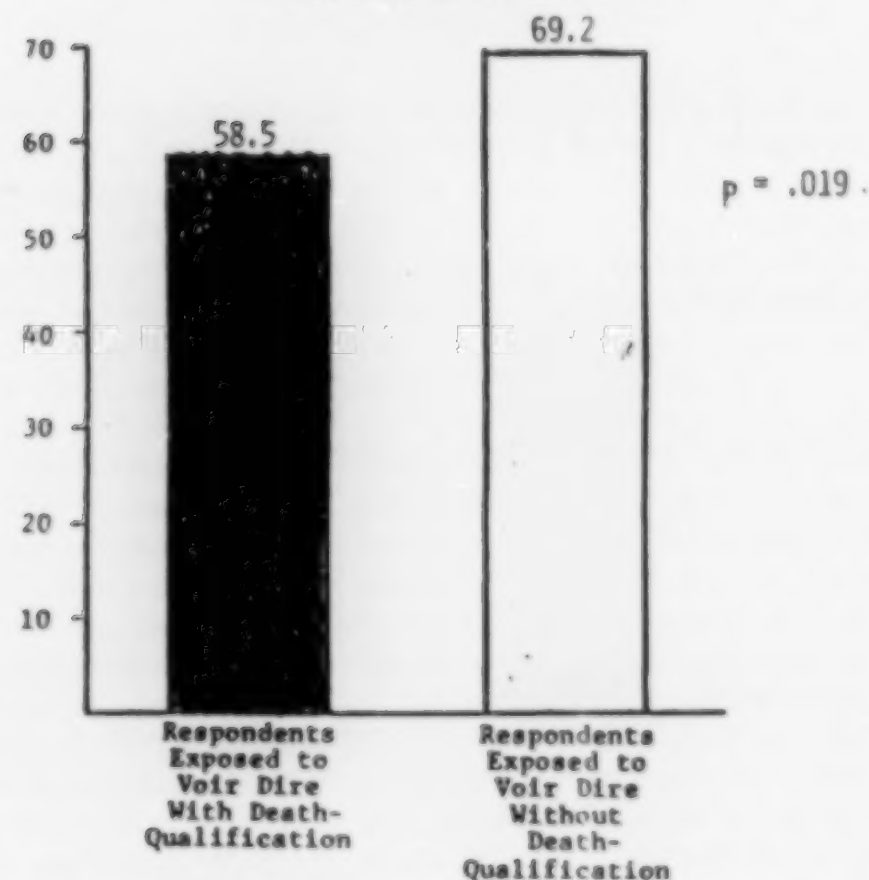
*Responses to Question No. 6.

EXHIBIT CH-53

HANEY DEATH-QUALIFICATION
PROCESS STUDY

Mean Assessment of the Degree to Which the
Defense Attorney Believes Defendant Guilty of
First Degree Murder*

(By Exposure to Voir Dire With/Without
Death-Qualification)



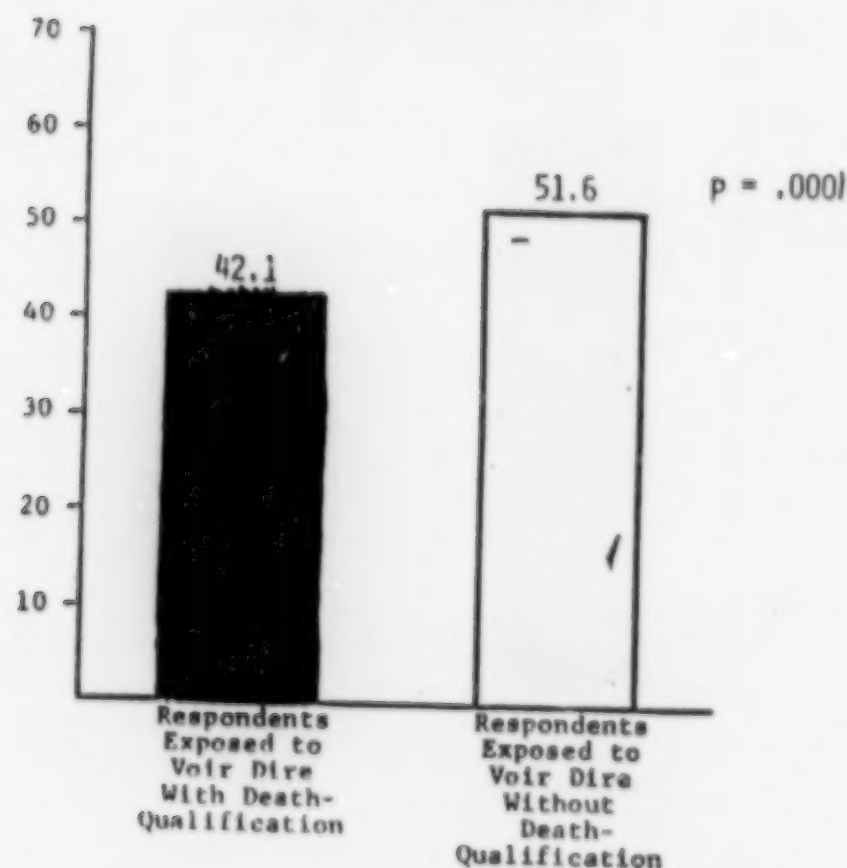
*Responses to Question No. 14. ON THIS CHART, A LOWER MEAN SCORE REPRESENTS A HIGHER ASSESSMENT THAT THE DEFENSE ATTORNEY BELIEVES THE DEFENDANT GUILTY OF FIRST DEGREE MURDER.

EXHIBIT CH-54

HANEY DEATH-QUALIFICATION
PROCESS STUDY

Mean Assessment of the Degree to Which the
Judge Believes Defendant Guilty of
First Degree Murder*

(By Exposure to Voir Dire With/Without
Death-Qualification)



*Responses to Question No. 15. ON THIS CHART, A LOWER MEAN SCORE REPRESENTS A HIGHER ASSESSMENT THAT THE JUDGE BELIEVES THE DEFENDANT GUILTY OF FIRST DEGREE MURDER.

EXHIBIT EB-64

PRE-PUBLICATION DRAFT: Do Not Quote or Cite
Without Permission

DUE PROCESS VS. CRIME CONTROL:
THE IMPACT OF DEATH QUALIFICATION
ON JURY ATTITUDES

Phoebe C. Ellsworth, Yale University
Robert Fitzgerald, University of California at Berkeley

INTRODUCTION

Previous surveys have consistently shown a strong correlation between attitudes toward capital punishment and attitudes on other issues relevant to the criminal justice system (Bronson, 1970; Vidmar and Ellsworth, 1974; Ellsworth and Ross, unpublished). These findings parallel experimental findings that people who favor the death penalty are more likely to convict as jurors in a criminal trial (Goldberg, 1970; Jurow, 1971; Wilson, 1964.)

In *Witherspoon v. Illinois*, 391 U.S. 510, (1968), the United States Supreme Court defined the currently applicable standards for excluding certain adamant opponents of the death penalty from jury service in capital cases. This survey was designed to determine whether the relationship between death penalty attitudes and other criminal justice attitudes, which has been established by prior studies, holds up when applied to the categories created by the *Witherspoon* decision: the "excludable" jurors who would not be permitted to serve on capital juries on the one hand, and the "death-qualified" jurors, who would be permitted to serve, on the other.

METHOD

1. Survey Instrument

The survey instrument (Appendix I) consisted of 16 attitudinal questions, and a standard range of demographic questions. Questions 3, 4 and 5 concerned attitudes toward the death penalty. The remainder of the attitudinal questions concerned attitudes towards other aspects of the criminal justice system.

Question 3 asked the respondents to state whether they were strongly in favor, somewhat in favor, somewhat opposed or strongly opposed to the death penalty. Question 4 was used to define the major independent variable for the analysis of the survey results: whether the respondents would be classified as "excludable" from death penalty juries on the ground that they would never consider imposing the death penalty in any case, or whether they would be classified as "death qualified" since they would consider imposing it in at least some cases.

However, some jurors are also excluded from service in capital cases because of attitudes toward capital punishment that would make it impossible for them to be fair and impartial in passing on the guilt or innocence of the defendant. Since these subjects would be disqualified from jury service in capital cases for reasons separate from their inability to consider the imposition of the death penalty, we have omitted them from the analysis of our results. Subjects who say they would be unable to be fair and impartial in capital cases were identified by their answers to question 5.

Questions 4 and 5 were written in consultation with Lawyers and law professors specializing in criminal law.

Pretesting indicated that the questions were comprehensible and that responses were sufficiently variable

so that meaningful between-group comparisons would be possible.

2. Population, Sampling and Administration

The survey was designed to be administered to a probability sample of adults who were eligible for jury service in Alameda County, California. A sample size of 800 was chosen to permit comparisons between subgroups within the population. The sample was drawn and the survey instrument was administered by the Field Research Corporation of San Francisco, California.

Random digit dialing was employed to contact designated telephone numbers. Within each household contacted, a designated respondent was chosen at random from a list of the eligible respondents. The universe of eligible respondents was defined as all adults 18 years of age or older who had a California driver's license or were registered to vote in Alameda County.

Interviewing was carried out from April 2 through April 28, 1979. Multiple call backs were used to contact the designated telephone number, and to contact and interview the designated respondent. Following these procedures, 811 interviews were completed.

RESULTS

1. Death Penalty Questions

In response to question 3, 35.5% of the sample said they were strongly in favor of the death penalty; 25.8% were somewhat in favor; 16.2% were somewhat opposed; and 21.1% were strongly opposed. In response to question 4, 21.3% stated that they would never be willing to impose it, while 78.2% stated that they would consider imposing it. Not surprisingly, a cross-tabulation of the responses to question 3 by the responses to question 4 (Table 1) shows

that the great majority (70.2%) of those strongly oppose the death penalty are also unwilling to consider its imposition.

In response to question 5, 9% of the respondents said that they would not be fair and impartial in deciding guilt in a capital case. After removing all respondents who would not be fair and impartial from the sample, 17.2% of the remaining respondents were excludable, and 82.8% were death qualified.

2. Demographic Variables

Demographic analysis of the survey results shows strong relationships between both sex and race and death qualification. Only 16.5% of the Whites in the sample were excludable, as compared to 25.5% of the Blacks. Respondents of Spanish and Asian descent showed a pattern of attitudes similar to Whites (13.8% excludable and 15.6% excludable, respectively). These differences (comparing Blacks to all others) are significant at the .05 level.

Similarly, 21% of the women respondents were excludable, as compared to 13.1% of the men. This difference is significant at the .01 level.

3. Attitudinal Questions

Table 4 contains a tabulation of the attitudinal items on the questionnaire by death penalty classification.

As Table 4 indicates, death qualified and excludable respondents differed markedly in their attitudes. The death qualified respondents were consistently more prone to favor the point of view of the prosecution, to mistrust the criminal defendant and his counsel, to take a punitive attitude toward criminals and to be more concerned with crime control than with due process. The excludable jurors, on the other hand, tended to be more concerned with mercy, more oriented toward due process, and less mistrustful

of the defendant and his legal representative. These differences in attitudes appeared in each of the thirteen relevant attitudinal questions. In eleven of the thirteen the differences were significant at the .05 level. This highly consistent pattern of attitudinal differences provides strong confirmation for the hypothesis that death qualification removes from juries in capital cases a group of eligible jurors who hold attitudes about the criminal justice system that are distinct and different from those of the remainder of the population.

REFERENCES

Studies

- Bronson, 1970. "On the Conviction-Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen." In 42 U.Colo. L.Rev. 1.
- Ellsworth and Ross, 1979. "Public Opinion and Capital Punishment: An Examination of the Views of Abolitionists and Retentionists." Unpublished.
- Goldberg, 1970. "Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumption in the Law." In 5 Harv. Civ. Rts. Civ. Lib. L.Rev. 53.
- Jurow, 1971. "New Data on the Effect of a Death-Qualified Jury on the Guilt Determination Process." 84 Harv. L.Rev. 567.
- Vidmar and Ellsworth, 1974. "Public Opinion and the Death Penalty." In 26 Stanford Law Review.

TABLE 1

% of Respondents Who Would:
(question 4)

Attitude toward death penalty (ques- tion 3)	% of Respondents Who Would: (question 4)	
	Not Willing To Consider Imposing	Willing To Consider Imposing
Strongly Favor	3.5% (10)	96.5% (277)
Somewhat Favor	5.8% (12)	94.2% (196)
Somewhat Opposed	22.3% (29)	77.7% (101)
Strongly Opposed	70.2% (120)	29.8% (51)
	(171)	(625)

$$\chi^2_{(3)} = 326.98$$

$$p < .0001$$

EXC. = Excludable
D.Q. = Death Qualified

TABLE 2

Question	Category of Respondent	% Of Respondents Who Answer:				χ^2
		Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	
2.a Better some guilty go free	EXC. D.Q.	32.5 16.1	30.0 27.9	20.8 27.2	16.7 23.9	$p < .001$
2.b Failure to testify indicates guilt	EXC. D.Q.	10.9 16.0	12.6 16.3	31.9 39.5	44.5 23.2	$p < .006$
2.c Consider worst criminal for mercy	EXC. D.Q.	40.2 15.0	37.6 29.0	10.3 15.5	12.0 40.5	$p < .001$
2.d District attorneys must be watched	EXC. D.Q.	21.2 23.9	31.9 25.0	32.7 26.4	14.2 24.6	$p < .05$
2.e Enforce all laws strictly	EXC. D.Q.	22.3 38.1	24.0 19.0	25.6 25.3	28.1 17.6	$p < .003$
6.a Guilty if brought to trial	EXC. D.Q.	14.9 17.2	11.6 15.1	17.4 17.7	56.2 49.9	$p < .6$
6.b Exclude illegally obtained evidence	EXC. D.Q.	50.0 38.4	13.9 18.1	17.2 24.0	13.9 19.6	$p < .09$
6.c Insanity plea is a loophole	EXC. D.Q.	27.5 51.5	31.7 26.5	22.5 13.7	13.3 8.3	$p < .001$
6.d Harsher treatment not solution to crime	EXC. D.Q.	55.0 32.7	25.0 26.3	14.2 17.9	5.8 23.1	$p < .001$
6.e Defense attorneys must be watched	EXC. D.Q.	21.0 38.9	43.7 34.6	23.5 17.4	11.8 9.1	$p < .003$
Item	Category					
1. Seriousness of problem: unemployment, crime	EXC. D.Q.	Unemployment 50.4 37.5				$p < .01$
7. Consider confession reported by news media	EXC. D.Q.	Would Not Consider 60.2 49.1				$p < .04$
8. Infer guilt from silence	EXC. D.Q.	Should Not Infer 86.0 76.0				$p < .07$
		Should Infer 14.0 24.0				



ALAMEDA COUNTY RESIDENTS SURVEY
—Main Questionnaire—

Time started: _____

(IF NECESSARY, RE-INTRODUCE YOURSELF TO THE DESIGNATED RESPONDENT. SEE INTRODUCTION ON SCREENING FORM.):

1. Which of the following problems do you think is more serious for Alameda County residents — unemployment or violent crime?

(DON'T READ) →	UNEMPLOYMENT 1	23
	VIOLENT CRIME 2	
	DON'T KNOW 3	
	OTHER: _____ 4	
	(RECORD VERBATIM)	

2. I'd like to read you some statements about crime and the criminal justice system. Please tell me whether you agree strongly, agree somewhat, disagree somewhat or disagree strongly with each statement. (BEGIN WITH THE FIRST STATEMENT. REPEAT ANSWER CATEGORIES AFTER READING EACH STATEMENT.)

	<u>DO NOT READ</u>	
	AGREE STRONGLY	DISAGREE STRONGLY
	AGREE SOMEWHAT	DISAGREE SOMEWHAT
	AGREE	DISAGREE
	STRONGLY	SOMEWHAT
	SOMEWHAT	STRONGLY
	REFUSED TO ANSWER	
a. It is better for society to let some guilty people go free than to risk convicting an innocent person 1 2 3 4 5 9		21
b. A person on trial who doesn't take the witness stand and deny the crime is probably guilty 1 2 3 4 5 9		22
c. Even the worst criminal should be considered for mercy 1 2 3 4 5 9		23
d. District attorneys have to be watched carefully, since they will use any means they can to get convictions 1 2 3 4 5 9		24
e. All laws should be strictly enforced, no matter what the results 1 2 3 4 5 9		25

3. I'd like to ask you some questions about the death penalty. Are you strongly in favor, somewhat in favor, somewhat opposed or strongly opposed to the death penalty?

STRONGLY IN FAVOR 1	26
SOMEWHAT IN FAVOR 2	
SOMEWHAT OPPOSED 3	
STRONGLY OPPOSED 4	

4. Now assume that you've been called as a possible juror in a first degree murder trial. The prosecutor is asking for the death sentence. Since this is a case where the death penalty may be imposed, the judge will ask you certain questions about your attitudes toward the death penalty before deciding whether you should be chosen to serve on the jury.

There are two parts to any trial where the death penalty may be imposed. In the first part, the jury decides whether the person on trial is guilty or not guilty. If the person is found guilty, there is a second part—a separate trial—in which the jury decides whether he or she should get the death penalty, or life in prison.

The judge will ask you the following question:

"Is your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?"

Now would you answer? Would you say ... (READ EACH ANSWER CHOICE)

I WOULD BE UNWILLING TO VOTE TO IMPOSE IT IN ANY CASE 1

OR: I WOULD CONSIDER VOTING TO IMPOSE IT IN SOME CASES 2

5. Now suppose that you were a juror in the first part of the trial. Just to decide whether the accused person is guilty or not guilty of the crime. The judge instructs you that in reaching your verdict you are only allowed to consider the evidence presented in court, and must follow the law as he will state it to you. If the accused is found guilty, there will be a separate trial to decide whether or not he or she should get the death penalty.

Which of the following expresses what you would do if you were a juror for the first part of the trial? (READ EACH ANSWER CHOICE)

I WOULD FOLLOW THE JUDGE'S INSTRUCTIONS AND DECIDE THE

QUESTION OF GUILT OR INNOCENCE IN A FAIR AND IMPARTIAL MANNER BASED ON THE EVIDENCE AND THE LAW 1

OR: I WOULD NOT BE FAIR AND IMPARTIAL IN DECIDING THE QUESTION OF GUILT OR INNOCENCE, KNOWING THAT IF THE PERSON WAS CONVICTED HE OR SHE MIGHT GET THE DEATH PENALTY. 2

6. Now I'd like to read you some more statements about the criminal justice system. Please tell me whether you agree strongly, agree somewhat, disagree somewhat or disagree strongly with each statement. (BEGIN WITH FIRST STATEMENT AND REPEAT ANSWER CATEGORIES AFTER READING EACH.)

DO NOT READ

AGREE AGREE DISAGREE DISAGREE KNOW/ DON'T REFUSED
STRONGLY SOMEWHAT SOMEWHAT STRONGLY UNSURE ANSWER

- a. A person would not be brought to trial unless he or she were guilty of a crime 1 2 3 4 5 9
- b. If the police obtain evidence illegally it should not be permitted in court, even if it would help convict a guilty person. 1 2 3 4 5 9
- c. The plea of insanity is a loophole allowing too many guilty people to go free 1 2 3 4 5 9
- d. Harsher treatment of criminals is not the solution to the crime problem. 1 2 3 4 5 9
- e. Defense attorneys have to be watched carefully, since they will use any means to get their clients off. 1 2 3 4 5 9

7. Now suppose that you're a juror in a criminal trial. The case has been reported in the newspapers and on television and radio. From the newspaper and television stories you have seen you know that the defendant made a confession to the crime. But the confession isn't presented during the trial.

The judge instructs you that you must make your decision about guilt or innocence only on the evidence you heard during the trial. Without the confession the prosecution's case is weak; it would not convince you beyond a reasonable doubt of the defendant's guilt. In reaching your verdict what would you do? (READ EACH STATEMENT NEVER CHOICE.)

I WOULD NOT CONSIDER THE CONFESSION,
EVEN THOUGH IT MAY MEAN THE
DEFENDANT WILL GO FREE.

OR: I WOULD TAKE THE CONFESSION INTO
CONSIDERATION IN REACHING MY VERDICT
SINCE IT CLEARLY INDICATES THE
DEFENDANT'S GUILT.

8. Now I'd like to ask you about a principle of law that you would have to follow if you were a juror in a criminal trial. Some people accept this principle and some don't. I want to know whether you agree or disagree with this principle.

If the defendant does not testify, this should not be treated as showing guilt. Do you agree or disagree with this principle?

AGREE
DISAGREE.

Finally, I'd like to ask you some background questions that will help us to analyze the results of this survey. All of your answers will remain confidential.

9. Could you please tell me how old you are?

AGE:

10. What is the highest grade of school you completed?

0 - 8 GRADES
SOME HIGH SCHOOL
HIGH SCHOOL COMPLETE
VOCATION/TECHNICAL SCHOOL
COMMUNITY COLLEGE
4-YEAR COLLEGE INCOMPLETE
4-YEAR COLLEGE COMPLETE
SOME GRADUATE WORK, NO DEGREE
MASTER'S DEGREE
PROFESSIONAL DEGREE (MD, LLB)
PH.D.

11. Are you presently working full-time or part-time? By full-time, we mean being employed 30 or more hours a week.

YES, EMPLOYED FULL-TIME.
YES, EMPLOYED PART-TIME.
NO, NOT WORKING.

IF "NO, NOT WORKING". ASK:

12. What do you spend your time doing? Are you on layoff or looking for work, retired, unable to work, attending school full time, keeping house or doing something else? (IF MORE THAN ONE APPLIES, CIRCLE FIRST APPEARING CATEGORY ON LIST)

LOOKING OR ON LAYOFF.
RETIRED
UNABLE TO WORK
ATTENDING SCHOOL
KEEPING HOUSE
OTHER:

13. What kind of work (do/did) you do? (PROBE: What (is/was) the main thing you (do/did) on your job?)
..2
..3
..6

14a. (Do/Did) you work for someone else, or (are/were) you self-employed?
..8
SOMEONE ELSE . . . 1 (SKIP TO Q.15)
SELF-EMPLOYED . . . 2 (ASK Q.14b)

(IF SELF-EMPLOYED, ASK):
14b. (Do) (Did) you have any other employees, other than yourself?
(IF YES): How many?
..4
..7
..8
YES, OTHER EMPLOYEES. . . . 1

(write in number)
NO 2

15. What kind of business or industry (do/did) you (last) work for?
(PROBE: What do they do or make there?)
..9
..10
..11

16. (Do/Did) you supervise any people on your job?
..12
YES 1 (ASK Q.17)
NO 2 (SKIP TO Q.18)

(IF YES, ASK:
17. (Do) (Did) you have any say in the pay or promotions of the people you supervise?
..13
YES 1 (ASK Q.19)
NO 2

(ASK EVERYONE):

18. What is your marital status? Are you presently married, divorced, separated, widowed, or have you never been married?

MARRIED 1 (ASK Q. 19)
DIVORCED 2
SEPARATED 3 (SKIP TO Q. 25a)
WIDOWED 4
NEVER BEEN MARRIED 5

(IF "MARRIED", ASK:

19. Is your (husband/wife) presently working full-time or part-time?
(COUNT 30 HOURS PER WEEK AS FULL-TIME)
..14
YES, FULL-TIME. 1 (SKIP TO Q.21)
YES, PART-TIME. 2
NO, NOT WORKING 3 (ASK Q.20)

(IF "NO, NOT WORKING", ASK:

20. What does (she/he) spend (her/his) time doing? Is (she/he) on layoff or looking for work, retired, unable to work, attending school fulltime, keeping house or doing something else? (IF MORE THAN ONE APPLIES, CIRCLE FIRST APPEARING CATEGORY ON LIST)
..15
LOOKING OR ON LAYOFF. 1 (ASK Q.21)
RETIRED 2
UNABLE TO WORK. 3 (SKIP TO Q. 25a)
ATTENDING SCHOOL. 4
KEEPING HOUSE 5
OTHER _____ 6 (specify)

21. What kind of work (does/did) (he/she) do? (PROBE: What (is/was) the main thing (he/she) (does/did) on (his/her) job?)

22a. (Do/Did) (he/she) work for someone else, or (are/were) (he/she) self-employed?

SOMEONE ELSE . . . 1 (SKIP TO Q.23)
SELF-EMPLOYED . . . 2 (ASK Q.22b)

(IF SELF-EMPLOYED, ASK:)

22b. (Do/Did) (he/she) have any other employees, other than her/himself?

YES, OTHER EMPLOYEES.

(write in number)

NO 2

23. What kind of business or industry (does/did) (she/he) work for? (PROBE: What do they do or make there?)

24a. (Do/Did) (she/he) supervise any people on (her/his) job?

YES 1 (ASK Q.24b)
NO. 2 (SKIP TO Q.25)

IF "YES", ASK:

24b. (Do/Did) (she/he) have any say in the pay or promotions of the people (she/he) supervised?

YES 1 } (ASK Q.25)
NO. 2 }

(ASK EVERYONE):

25a. Are you registered to vote?

YES 1 (ASK Q.25b)
NO. 2 (SKIP TO Q.26)

IF "YES", ASK:

25b. Are you registered to vote as a Democrat, as a Republican, or with some other party? (IF OTHER PARTY, ASK: Which other party?)

DEMOCRAT 1
REPUBLICAN 2
AMERICAN INDEPENDENT 3
PEACE AND FREEDOM 4
OTHER: 5

(specify)

REGISTERED AS DECLINE TO STATE . 6

26. What, if any, is your religious preference—Protestant, Roman Catholic, Jewish or some other faith? (IF PROTESTANT, ASK: Which denomination is that?)

PROTESTANT 01
(record denomination)
CATHOLIC 40
JEWISH 41
OTHER RELIGION: 50
(specify)
NONE OR ATHEIST. 80

27a. Do you happen to be of Spanish, or Mexican descent?

YES 1 (SKIP TO Q.28)
NO. 2 } (ASK Q.27b)
REFUSED 3

IF "NO" OR "REFUSED", ASK:

27b. For classification purposes, we'd like to know what your racial background is. Are you White, Black, Asian or are you a member of some other race?

WHITE 1
BLACK 2
ASIAN 3
OTHER 4
REFUSED 0

(22 Dec)

132

While we don't need to know your exact income, please tell me whether your total (PERSONAL/FAMILY) income last year from all sources, and before taxes, was under or over \$15,000.

UNDER \$30,000	1	ASK 3
\$30,000 - \$40,000	1	ASK 3
OVER \$40,000	1	ASK 3
REFUSED	05	

UNDER \$20,000	.	.	.	06
\$20,000 - \$25,000	.	.	.	07
OVER \$25,000	.	.	.	08
REFUSED	.	.	.	09

UNDER \$35,000	.	.	.	10
OVER \$35,000	.	.	.	11
REFUSED	.	.	.	12

UNDER \$45,000	.	.	.	13
\$45,000 - \$50,000	.	.	.	14
OVER \$50,000	.	.	.	15
REFUSED	.	.	.	16

30. It is possible that we may want to call you again at a later date about participating in a study of attitudes toward the criminal justice system. Would that be all right?

YES, RESPONDENT GIVES PERMISSION. . . . 1
NO, REFUSED 2

31. RECORD SEX OF RESPONDENT:

MALE 1
FEMALE 2

Thank you very much for your cooperation. So that my supervisor can verify this interview, may I please have your name and address and confirm your telephone number? (IF NECESSARY, SAY): This information will be removed from the questionnaire after the interviews have been validated. This insures that my work was done honestly and correctly.

RESPONDENT NAME: _____
ADDRESS: _____
CITY: _____ ZIP CODE: _____ (16-18)
TELEPHONE NO.: _____
CLUSTER NUMBER: _____ (11-14)
INTERVIEWER NAME: _____
DATE: _____ TIME ENDED: _____

OFFICE CODES

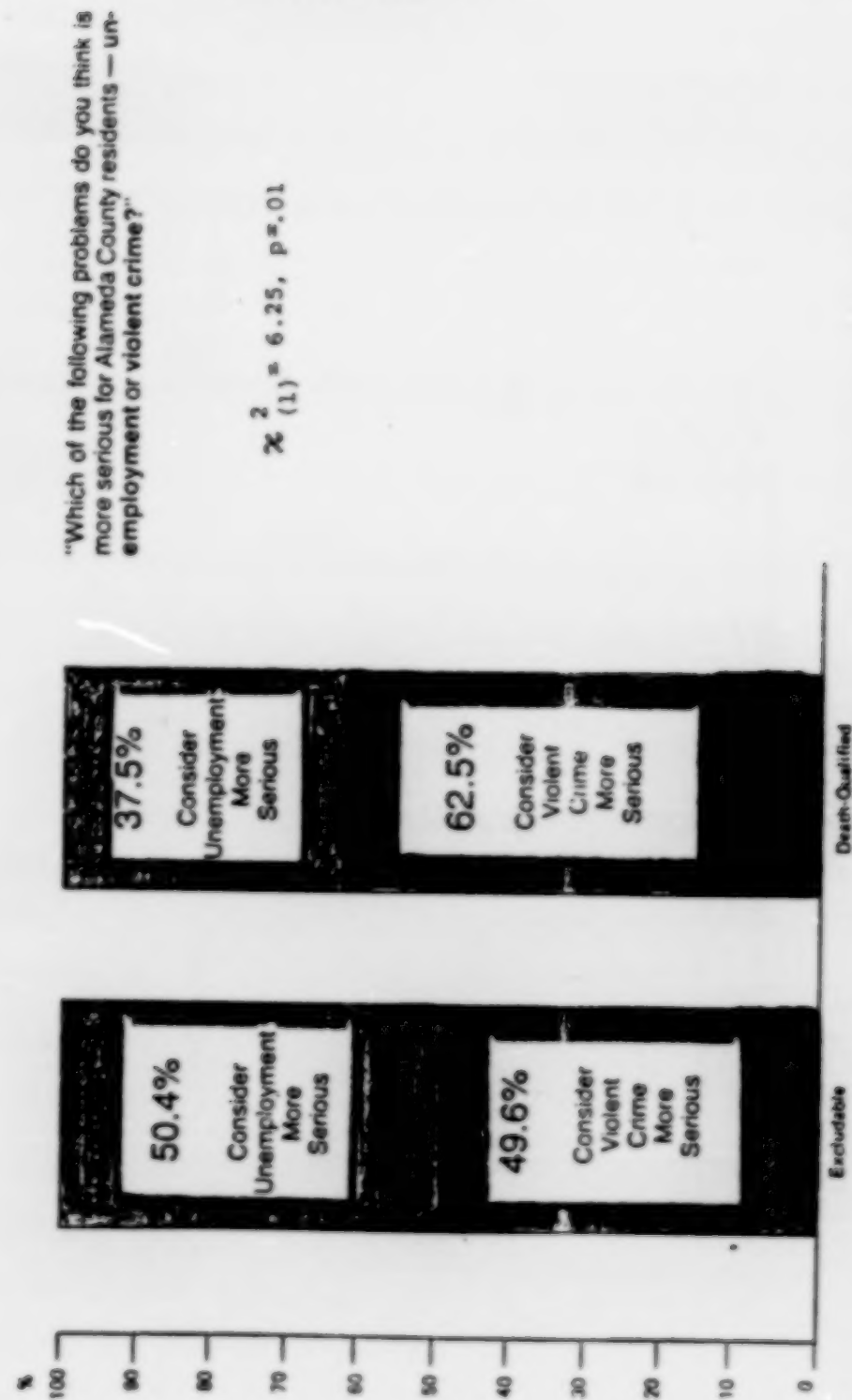
VERIFICATION — (FOR OFFICE USE ONLY)

Interview Attempt: _____ 17
Total eligible persons
in household: _____ 18

Verified by: _____
Date: _____
Remarks: _____

EXHIBIT EB-66

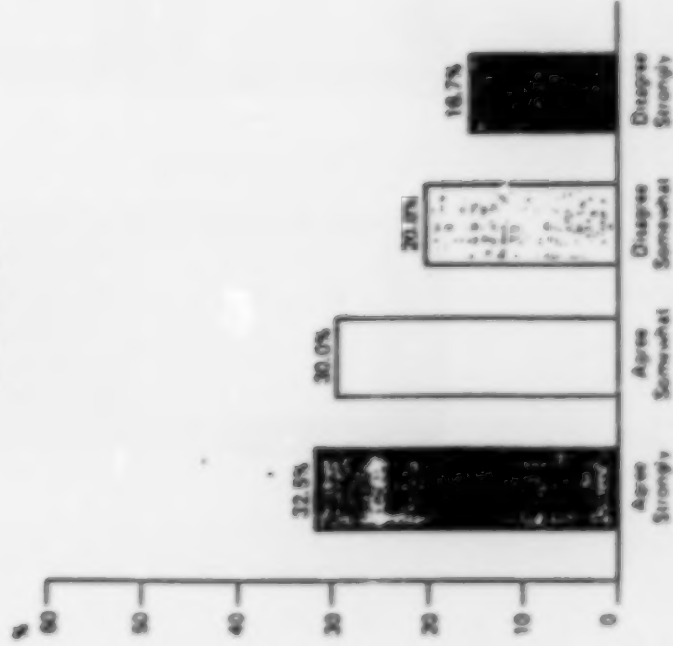
ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY
1. Seriousness of problem — unemployment, crime



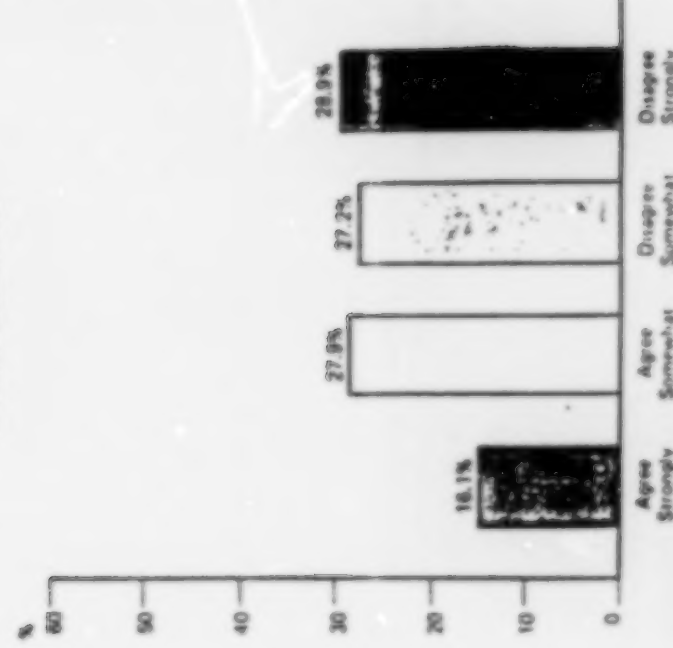
2.a. Better Some Guilty Go Free
 "It is better for society to let some guilty people go free than to risk convicting an innocent person."

$$\chi^2_{(3)} = 21.5, p < .001$$

Excludable



Death-Qualified



122

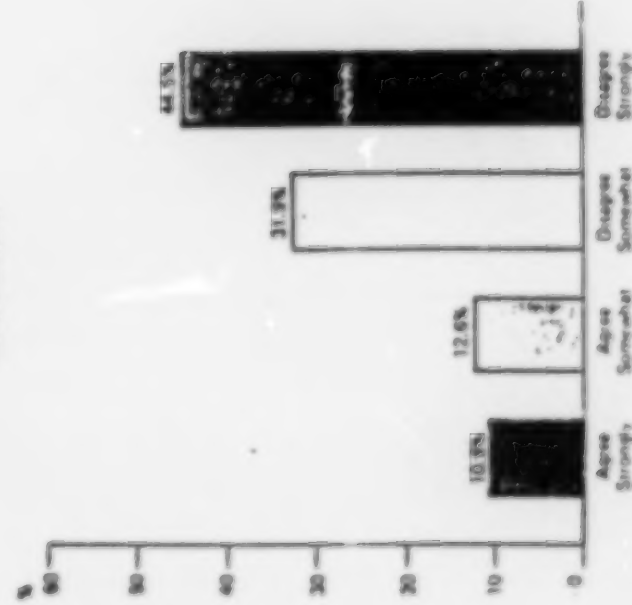
EXHIBIT EB-67

ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

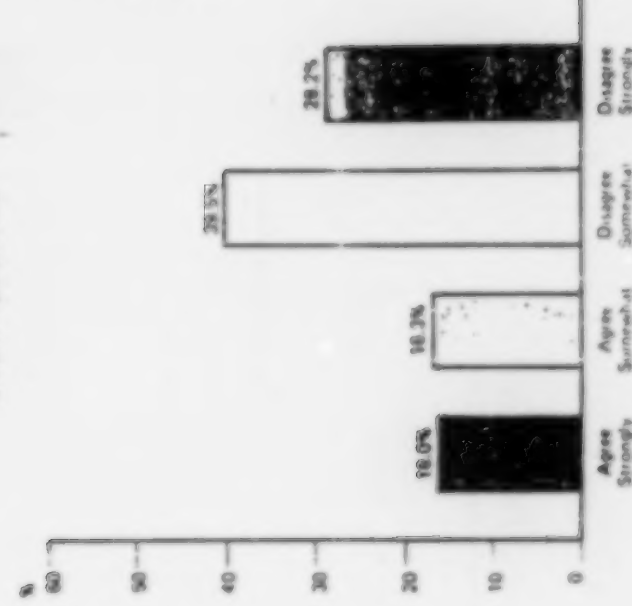
2.b. Failure To Testify Indicates Guilt
 "A person on trial who doesn't take the witness stand and deny the crime is probably guilty."

$$\chi^2_{(3)} = 12.57, p < .006$$

Excludable



Death-Qualified



123

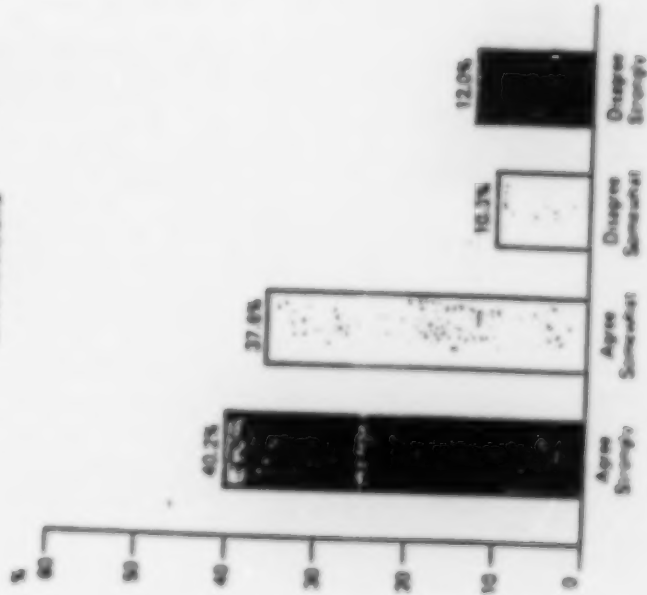
EXHIBIT EB-68

ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

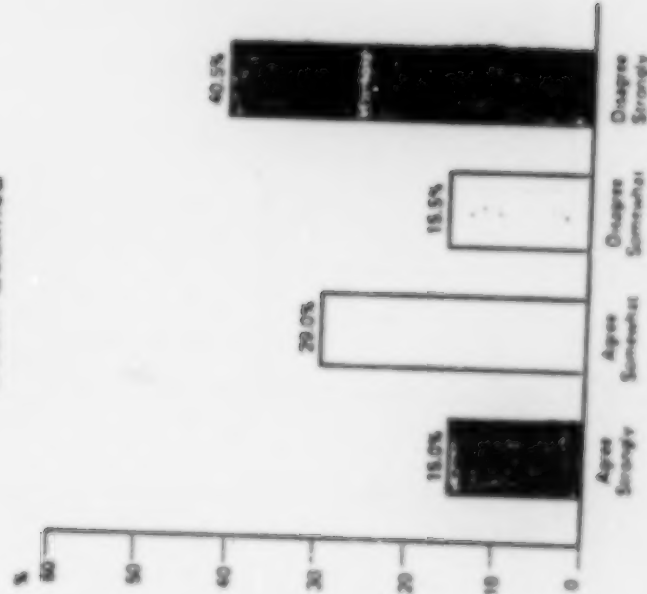
2.c. Consider Worst Criminal For Mercy "Even the worst criminal should be considered for mercy."

$$\chi^2_{(3)} = 58.52, p < .0001$$

Excludable



Death-Qualified



124

EXHIBIT EB-69

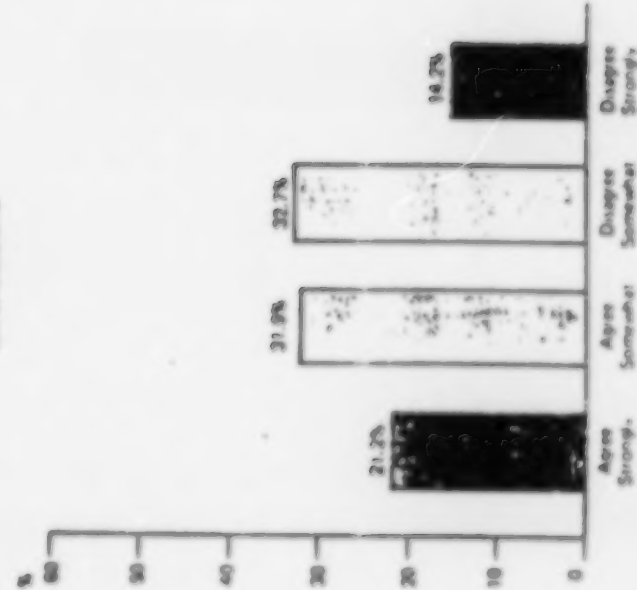
ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

2.d. District Attorneys Must Be Watched.

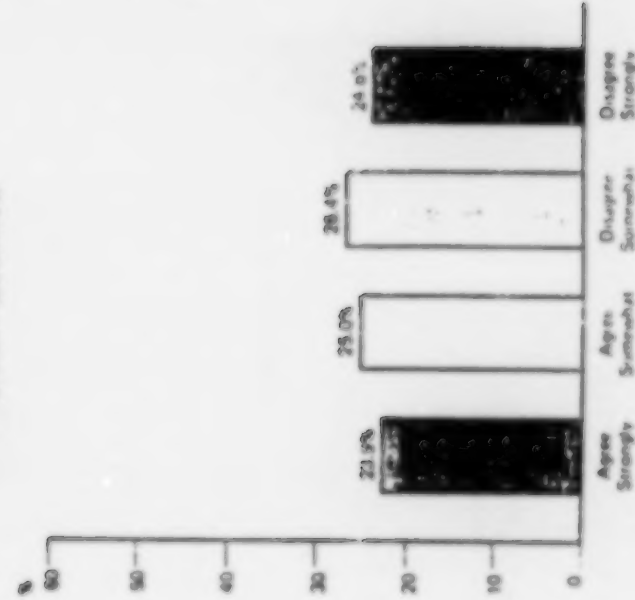
"District attorneys have to be watched carefully, since they will use any means they can to get convictions."

$$\chi^2_{(3)} = 7.89, p < .05$$

Excludable



Death-Qualified



125

EXHIBIT EB-70

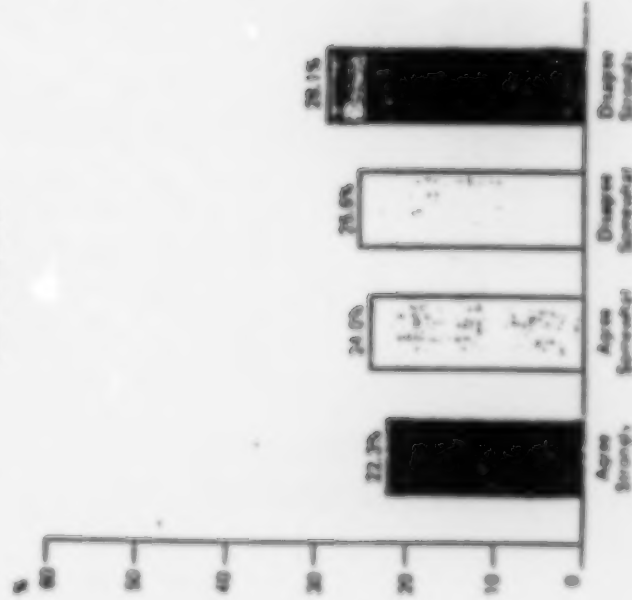
ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

2.e. Enforce All Laws Strictly

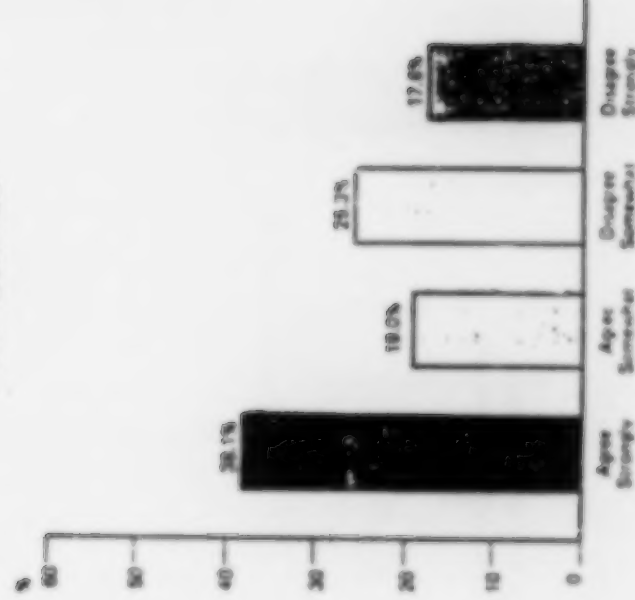
"All laws should be strictly enforced, no matter what the results."

$$\chi^2_{(3)} = 14.03, p < .003$$

Excludable



Death-Qualified



126

EXHIBIT EB-71

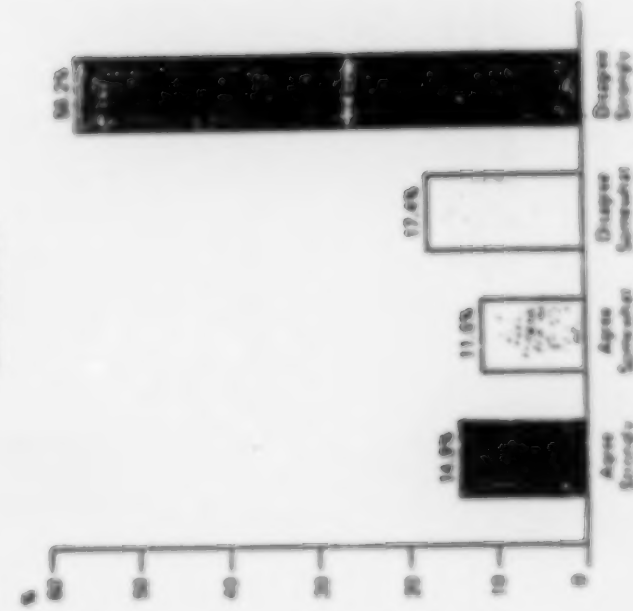
ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

6.a. Guilty If Brought To Trial

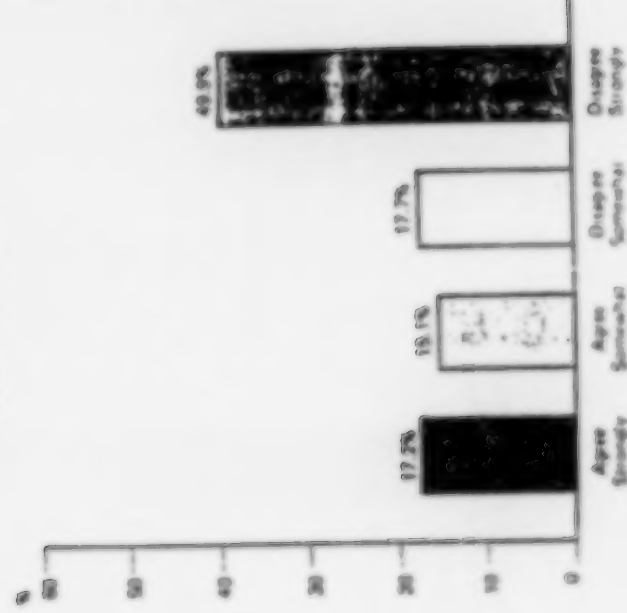
"A person would not be brought to trial unless he or she were guilty of a crime."

$$\chi^2_{(3)} = 1.99, p = n.s.$$

Excludable



Death-Qualified



127

EXHIBIT EB-72

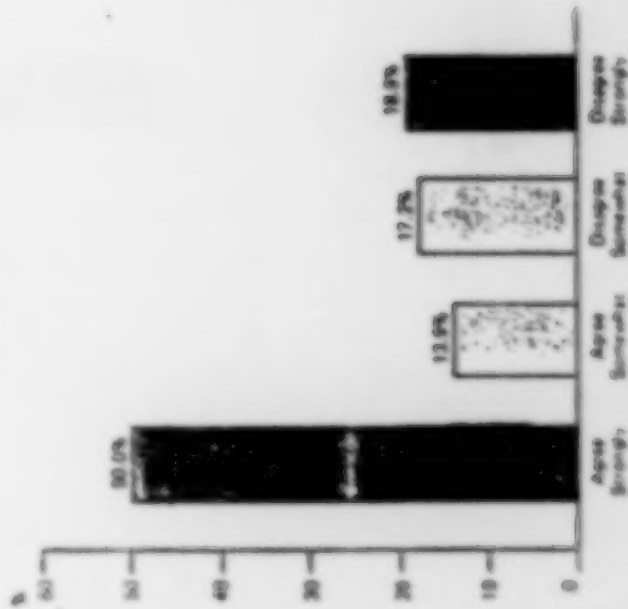
ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

6.b. Exclude Illegally Obtained Evidence

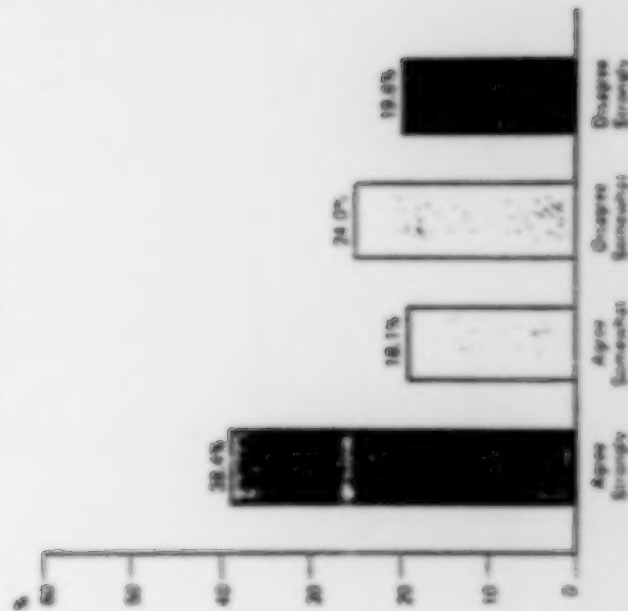
"If the police obtain evidence illegally it should not be permitted in court, even if it would help convict a guilty person."

$$\chi^2_{(3)} = 6.40, p = .09$$

Excludable



Death-Qualified



128

EXHIBIT EB-73

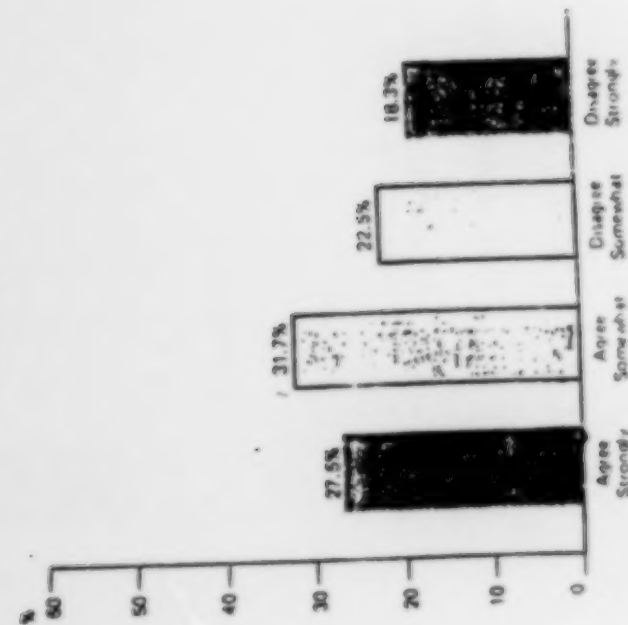
ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

6.c. Insanity Plea Is a Loophole

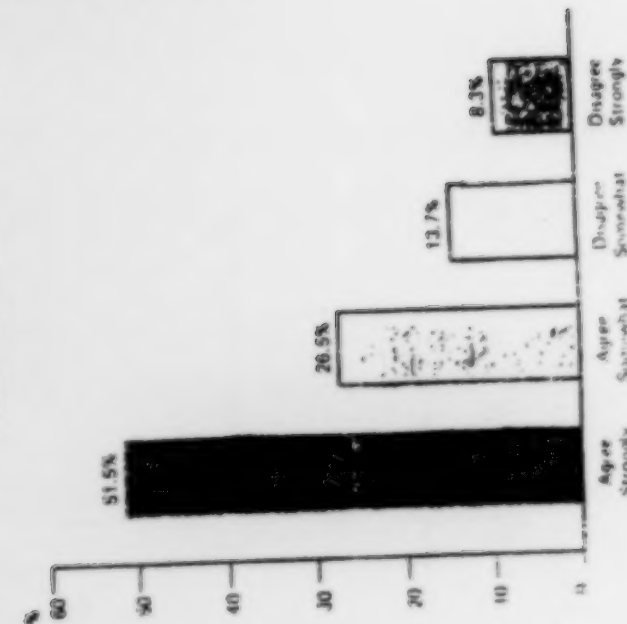
"The plea of insanity is a loophole allowing too many guilty people to go free."

$$\chi^2_{(3)} = 28.01, p < .0001$$

Excludable



Death-Qualified



129

EXHIBIT EB-74

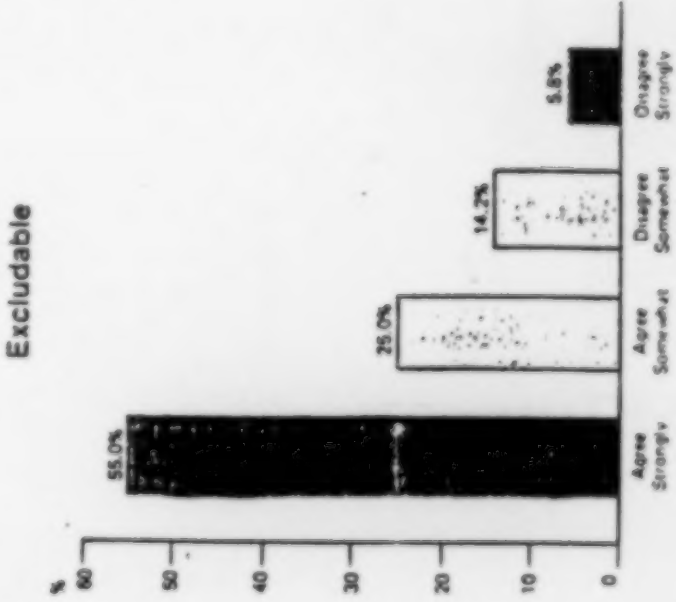
ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

6.d. Harsher Treatment Not Solution To Crime

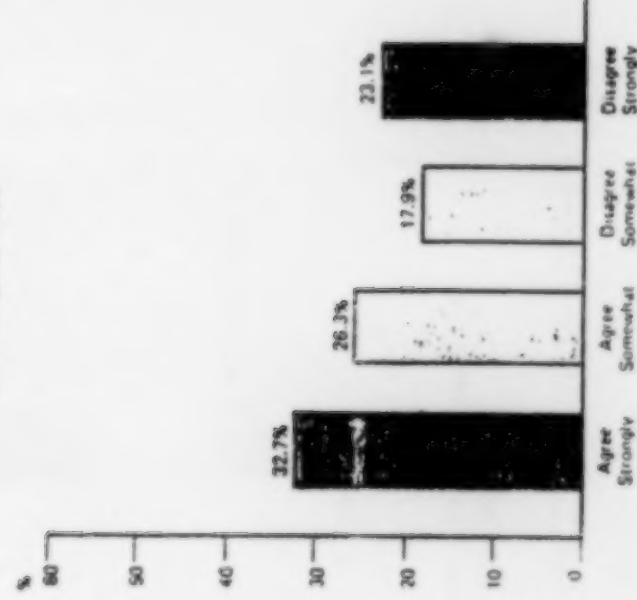
"Harsher treatment of criminals is not the solution to the crime problem."

$$\chi^2_{(3)} = 28.98, p < .0001$$

Excludable



Death-Qualified



130

EXHIBIT EB-75

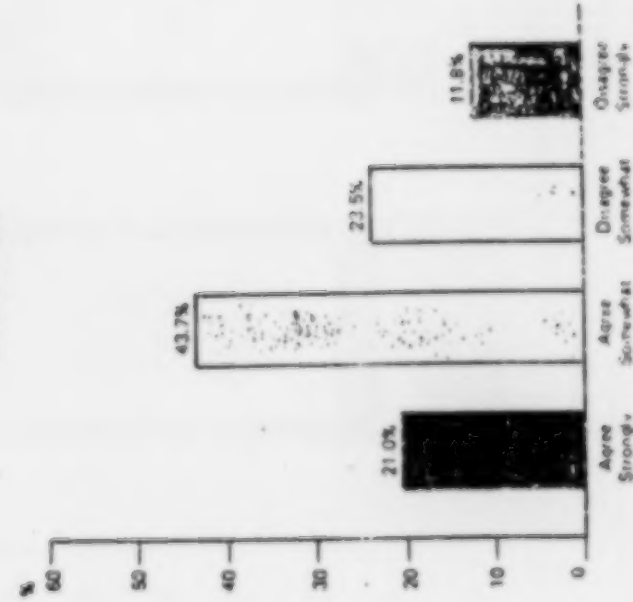
ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY

6.e. Defense Attorneys Must Be Watched

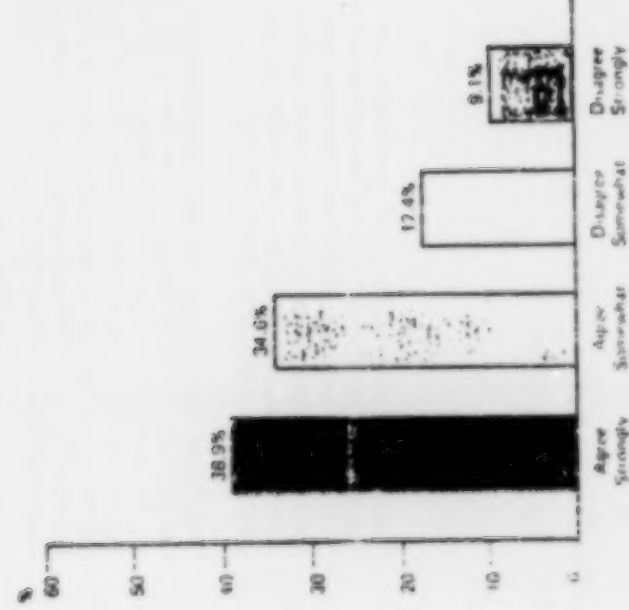
"Defense attorneys have to be watched carefully, since they will use any means to get their clients off."

$$\chi^2_{(3)} = 13.82, p = .003$$

Excludable



Death-Qualified



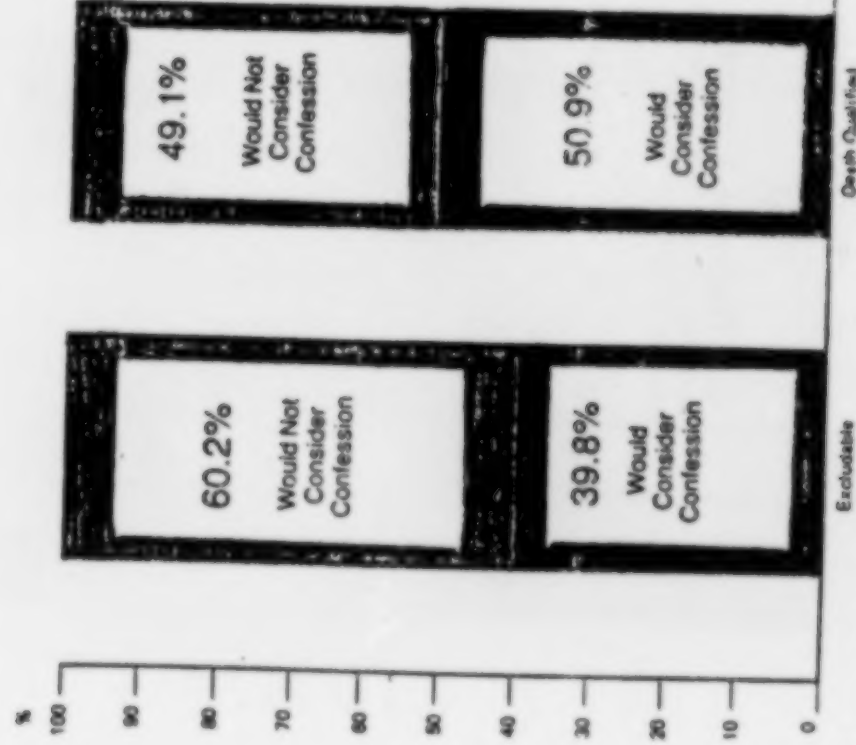
131

EXHIBIT EB-76

ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY
7. Consider confession reported by news media

132

EXHIBIT EB-77



"Now suppose that you're a juror in a criminal trial. The case has been reported in the newspapers and on television and radio. From the newspaper and television stories you have seen you know that the defendant made a confession to the crime. But the confession isn't presented during the trial.

"The judge instructs you that you must make your decision about guilt or innocence only on the evidence you heard during the trial. Without the confession the prosecution's case is weak; it would not convince you beyond a reasonable doubt of the defendant's guilt. In reaching your verdict what would you do?

"I would not consider the confession, even though it may mean the defendant will go free.

or

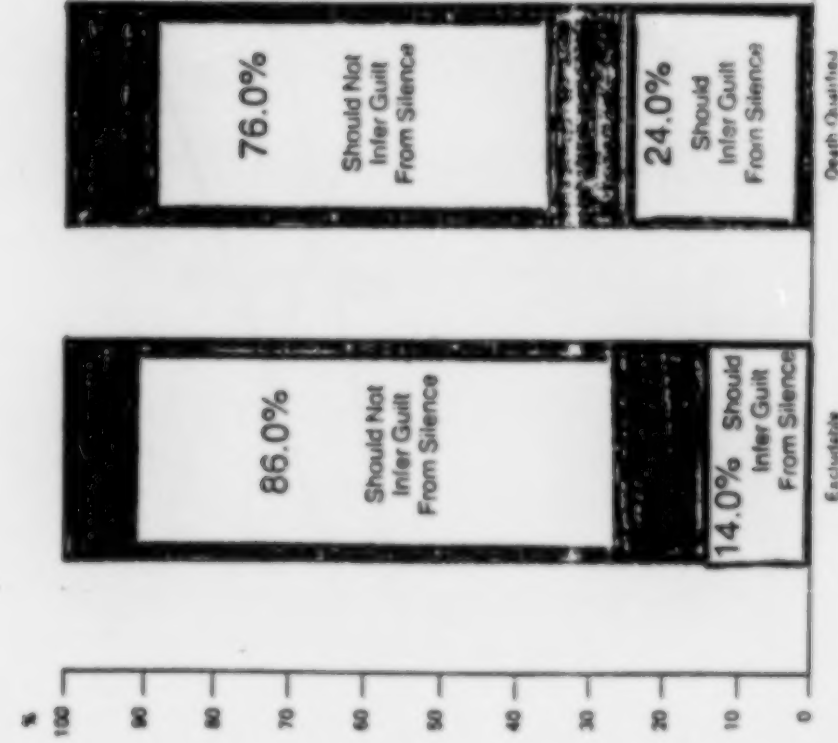
"I would take the confession into consideration in reaching my verdict since it clearly indicates the defendant's guilt."

$$\chi^2 (1) = 4.41, p < .04$$

ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY
8. Infer guilt from silence

133

EXHIBIT EB-78



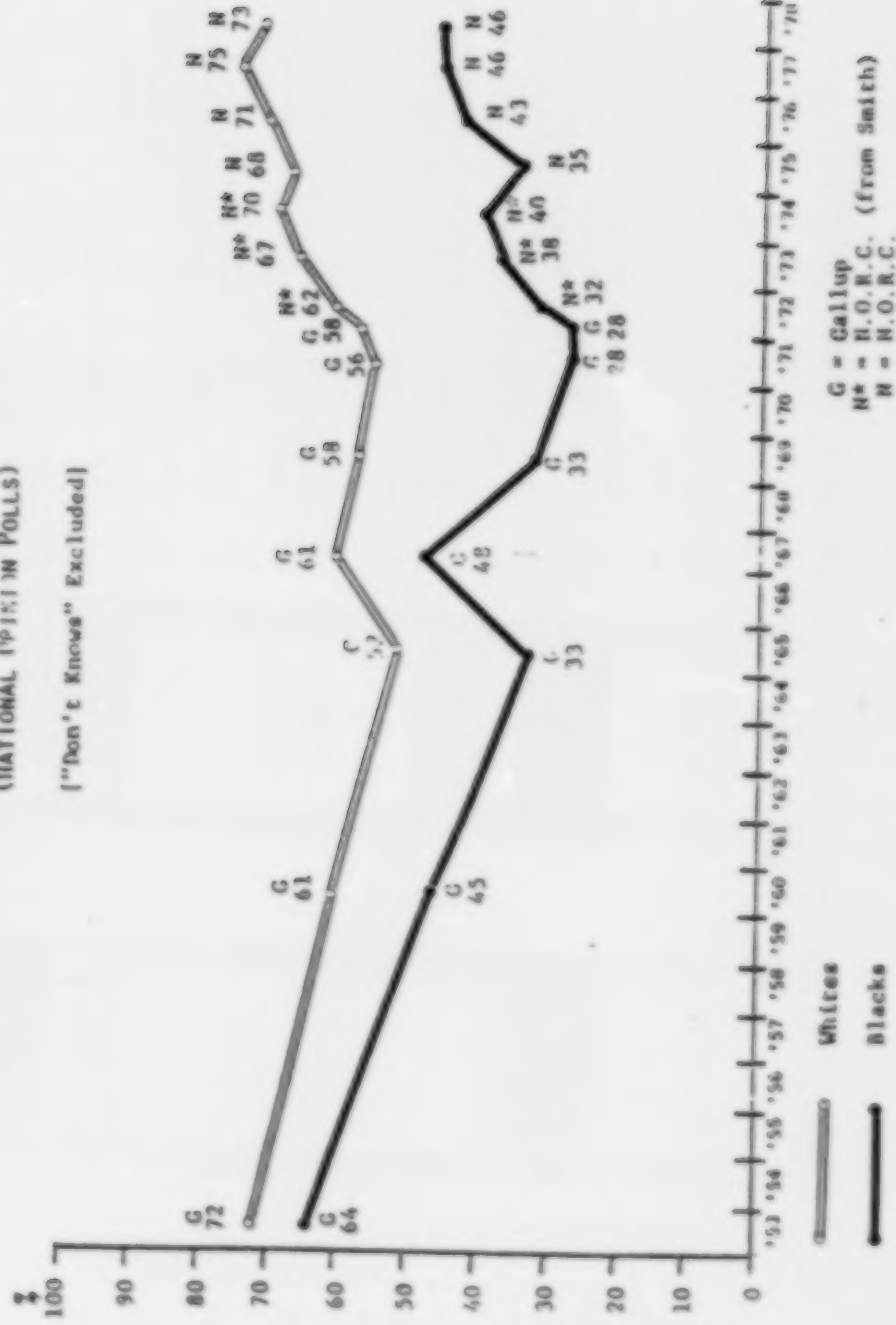
"Now I'd like to ask you about a principle of law that you would have to follow if you were a juror in a criminal trial. Some people accept this principle and some don't. I want to know whether you agree or disagree with this principle.

"If the defendant does not testify, this should not be treated as showing guilt. Do you agree or disagree with this principle?"

$$\chi^2 (1) = 5.15, p = .02$$

PROPORTIONS OF WHITES AND BLACKS FAVORING THE DEATH PENALTY (NATIONAL OPINION POLLS)

["Don't Knows" Excluded]

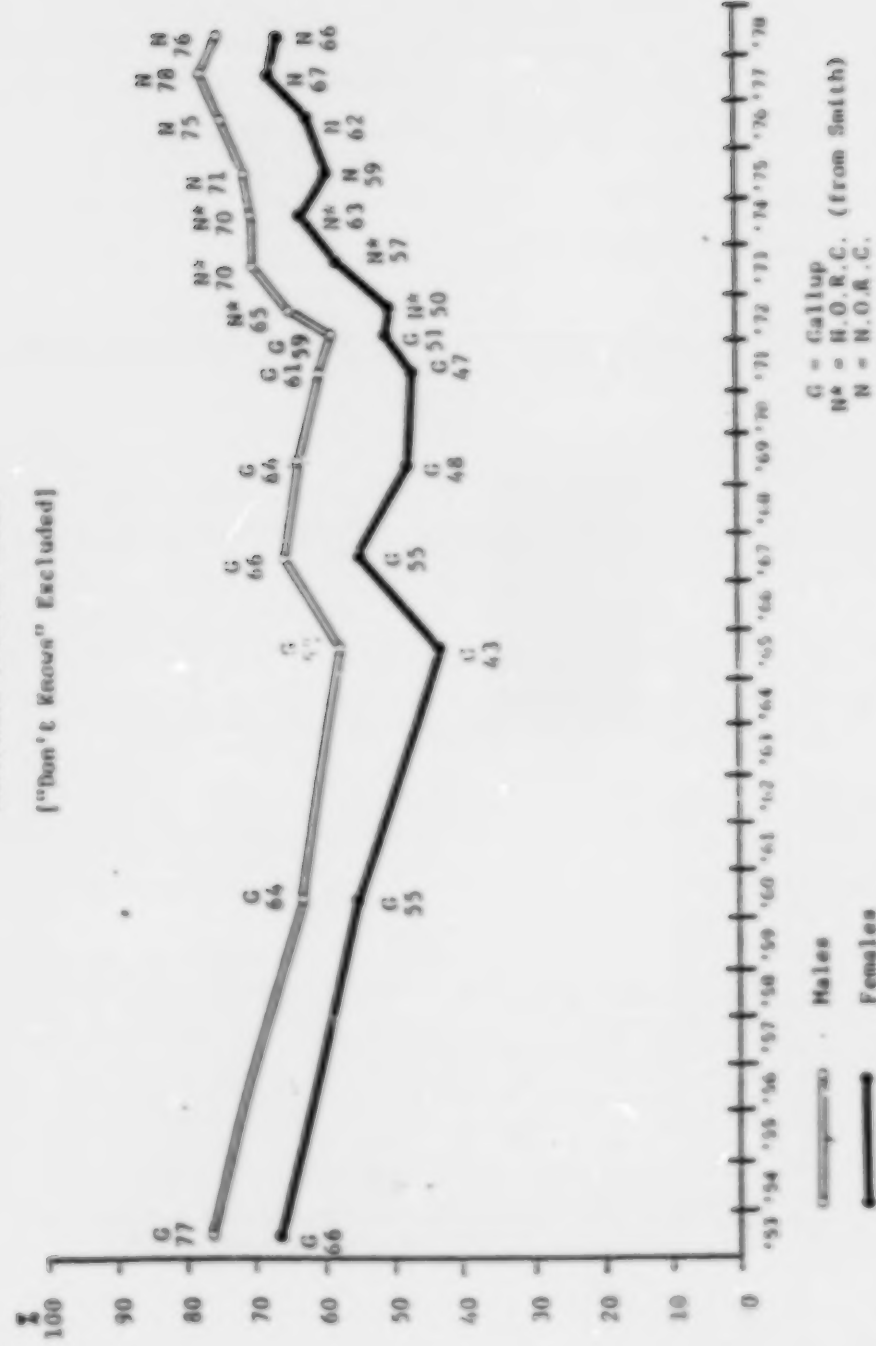


134

EXHIBIT EB-129

PROPORTION OF MALES AND FEMALES FAVORING THE DEATH PENALTY (NATIONAL OPINION POLLS)

["Don't Knows" Excluded]

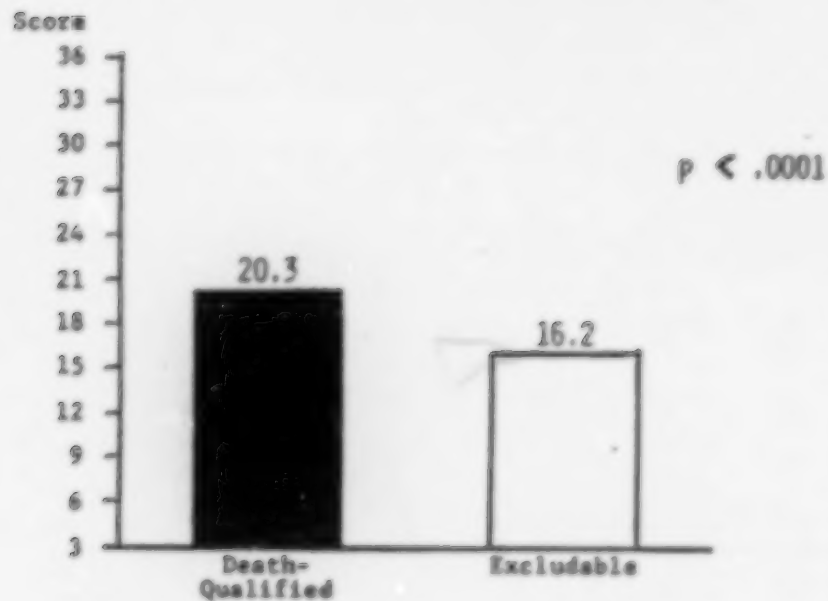


135

EXHIBIT EB-130

EXHIBIT RH-11

ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY
 INDEX OF PROSECUTION-PRONENESS ACROSS ALL ATTITUDINAL
 STATEMENTS
 (BY DEATH-QUALIFIED/EXCLUDABLE)



n respondent was scored on a scale ranging from 3 to 36, where a score of 36 represented the largest possible number of pro-prosecution responses to the attitudinal statements. On the three statements with response choices, each response was given a score of 1 or 2, with a score of 2 assigned to the pro-prosecution response. On the ten statements with four response choices, each response was given a score of 0, 1, 2 or 3, with the score of 3 assigned to the strongest possible pro-prosecution response to each statement. The index given in this chart is the sum of the scores for all thirteen attitudinal statements. The bars represent the mean index values for the death-qualified respondents and the excludable respondents.

EXHIBIT RH-14

ELLSWORTH/FITZGERALD 1979 ALAMEDA COUNTY SURVEY
 "NET RESPONSE" - EIGHT QUESTIONS

	DEATH-QUALIFIED	EXCLUDABLE
2.a. "It is better for society to let some guilty people go free than to risk convicting an innocent person."	-13	+20
2.b. "A person on trial who doesn't take the witness stand and deny the crime is probably guilty."	-24	-43
2.c. "Even the worst criminal should be considered for mercy."	-19	+42
2.e. "All laws should be strictly enforced, no matter what the results."	+17	-6
6.a. "A person would not be brought to trial unless he or she were guilty of a crime."	-34	-44
6.b. "If the police obtain evidence illegally it should not be permitted in court, even if it would help convict a guilty person."	+16	+29
6.c. "The plea of insanity is a loophole allowing too many guilty people to go free."	+50	+14
6.d. "Harsher treatment of criminals is not the solution to the crime problem."	+14	+55

EXHIBIT AY-1

Cases in which the trial court excused for cause potential jurors because of their opinions concerning capital punishment.

Sup. Ct. Name no.	W'spoon	ADP	Total Jurors	
75-36	MAXWELL	12	0	48
75-50	HARRIS	11	0	45
75-107	TAMMER	19	0	34
75-110	COLLINS	2	0	41
75-115	NEAL	8	0	39
75-207	VENABLE	3	1	46
75-209	GILES	3	0	41
76-50	WOODWARD	3	0	27
76-60	GRIGSBY	2	0	38
76-93	WILLIAMS F	20	0	34
76-125	HULSEY	9	0	46
76-177	HUTCHERSON	3	2	47
77-109	SWINDLER I	6	0	62
77-193	BLY	9	0	42
77-198	CLARK	4	0	31
77-210	ALEXANDER	17	1	60
78-16	KLINGENSMITH	4	0	43
78-161	WESTBROOK I	0	0	37
78-168	SUNLIN	4	0	38
78-193	RUIZ/DENTON I	1	0	71
78-227	MCCREE	8	0	34
79-32	VAN CLEAVE	6	0	48
79-80	MILLER	13	1	49

Cont'd

Sup. Ct. NAME no.	W'spoon	ADP	Total Jurors			
79-116	SWINDLER II	4	1	124		
79-149	TITUS	7	1	52		
79-197	ROBINSON I	2	0	30		
80-67	EARL	9	0	41		
80-69	SINGLETON	9	0	41		
80-107	BREWER	10	0	51		
80-110	CASSELL	5	1	46		
80-119	CURRY	2	0	33		
80-147	RUIZ/DENTON II	22	0	116		
80-175	WILSON	10	0	48		
80-217	WILLIAMS D	7	0	42		
80-227	HOBBS	8	2	50		
81-8	SIMPSON	2	0	16		
81-10	LINDER	7	0	41		
81-28	COBLE	3	0	44		
81-52	ROBINSON II	0	0	40		
81-68	WESTBROOK II	0	0	14		
81-73	WALKER	1	0	17		
TOTALS				275	10	1914

EXHIBIT AY-2

Percentages of Prospective Jurors
in Arkansas Capital Cases Excluded
for Cause Because They Could Not
Consider the Full Range of Penalties

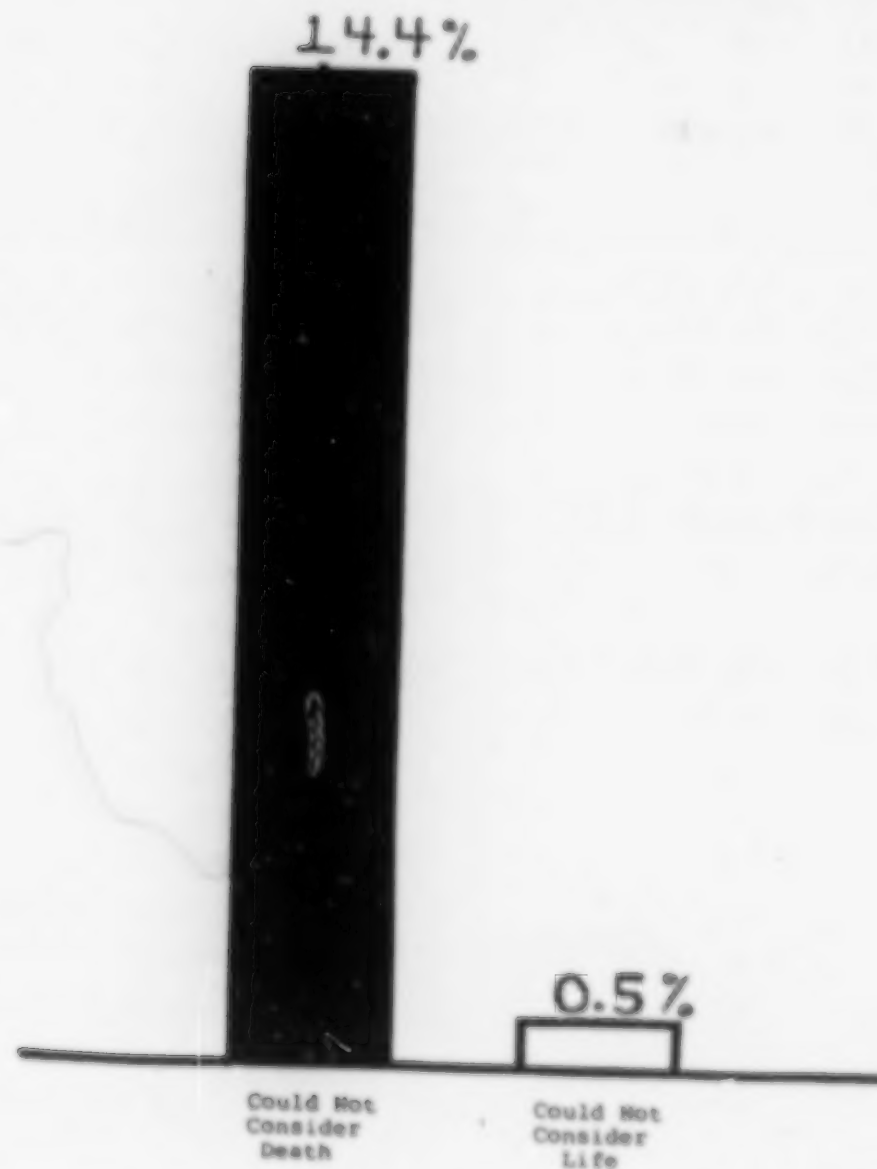


EXHIBIT AY-3

Cases in which potential jurors were asked if they would
automatically give any person convicted of capital murder
a death sentence.

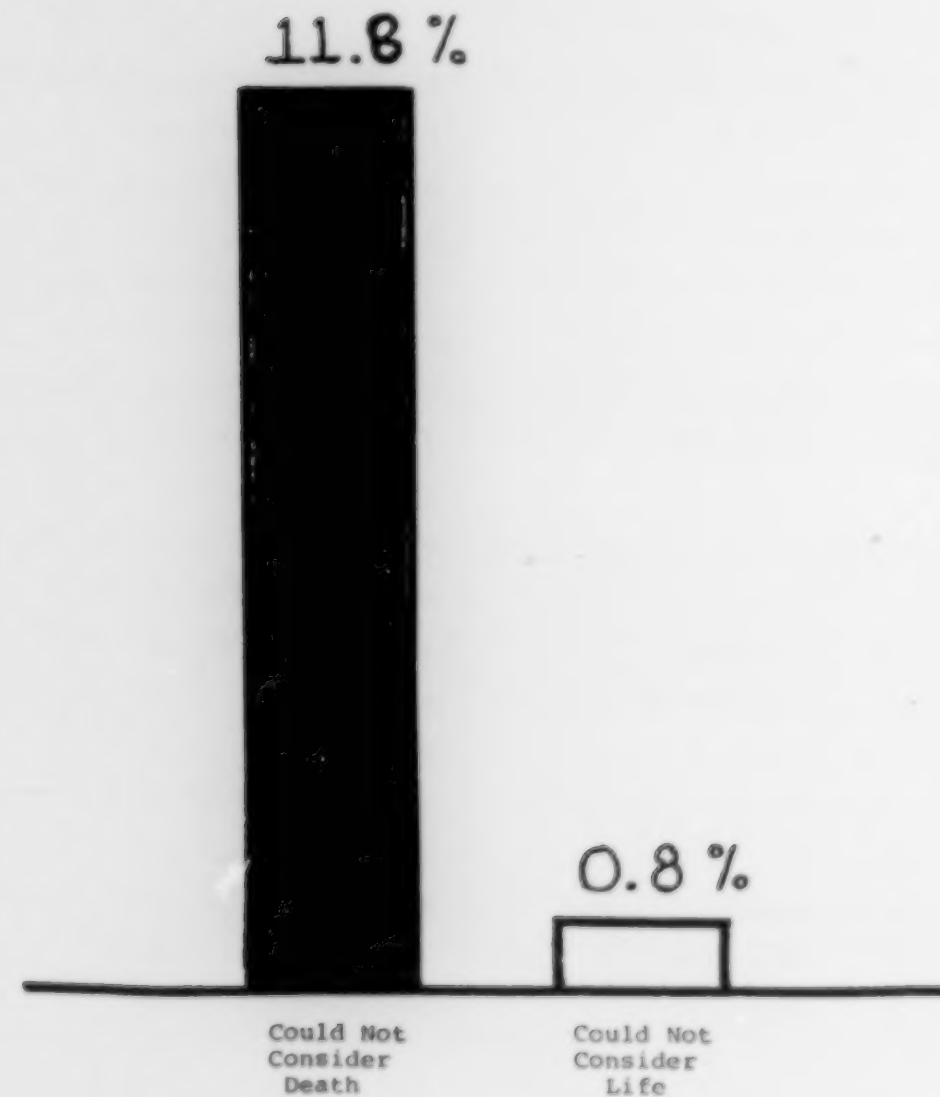
Sup. Ct. No.	Name	W'spoon	ADP	Total Jurors
74-249	COLLINS	2	0	41
75-207	VENABLE	3	1	46
75-269	GILES	3	0	41
76-125	HULSEY	9	0	46
76-177	HUTCHERSON	3	2	47
77-189	SWINDLER I	6	0	62
77-198	CLARK	4	0	31
77-210	ALEXANDER	17	1	60
78-161	WESTBROOK I	0	0	37
78-193	RUIZ/DENTON I	1	0	71
79-80	MILLER	13	1	49
79-116	SWINDLER II	4	1	126
79-140	TITUS	7	1	52
79-197	ROBINSON I	2	0	30
80-69	SINGLETON	9	0	47
80-107	BREWER	10	0	51
80-110	CASELL	5	1	46
80-119	CURRY	2	0	33
80-147	RUIZ/DENTON II	20	0	113

Cont'd

Sup. Ct. No.	Name	W'spoon	ADP	Total Jurors
80-175	WILSON	10	0	48
80-217	WILLIAMS D	7	0	42
80-227	HOBBS	8	2	50
81-8	SIMPSON	2	0	36
81-10	LINDER	7	0	43
81-28	COBLE	3	0	44
81-73	WALKER	1	0	37
TOTALS		155	10	1329
PERCENTAGES		11.86	0.84	

EXHIBIT AY-4

In Cases Where Persons Were Asked
About Their Inability to Consider
Life, the Percentages of Prospective
Jurors Who Were Excluded Because
They Could Not Consider Death



Cases in which the trial court excused for cause potential jurors because of their opinions concerning capital punishment.

Sup. Ct. Name no.	W'spoon	ADP	Total Jurors	
75-36	MAXWELL	12	0	48
75-50	HARRIS	11	0	45
75-107	TANNER	19	0	34
75-110	COLLINS	2	0	41
75-115	NEAL	8	0	39
75-207	VENABLE	3	1	46
75-209	GILES	3	0	41
76-50	WOODWARD	3	0	27
76-60	GRIGSBY	2	0	38
76-93	WILLIAMS F	20	0	34
76-125	HULSEY	9	0	46
76-177	HUTCHERSON	3	2	47
77-189	SWINDLER I	6	0	62
77-193	BLY	9	0	42
77-198	CLARK	4	0	31
77-210	ALEXANDER	17	1	60
78-16	KLINGENSMITH	4	0	43
78- 161	WESTBROOK I	0	0	37
78-168	SUMLIN	4	0	38
78-193	RUIZ/DENTON I	1	0	71
78-227	ACCREE	8	0	34
79-32	VAN CLEAVE	6	0	48
79-80	MILLER	13	1	49

Cont'd

Sup. Ct. NAME no.	W'spoon	ADP	Total Jurors	
79-116	SWINDLER II	4	1	126
79-140	TITUS	7	1	52
79-197	ROBINSON I	2	0	39
80-67	EARL	9	0	41
80-69	SINGLETON	9	0	47
80-107	BREWER	10	0	51
80-110	CASELL	5	1	46
80-119	CURRY	2	0	33
80-147	RUIZ/DENTON II	22	0	113
80-175	WILSON	10	0	48
80-217	WILLIAMS D	7	0	42
80-227	HOBBS	8	2	50
81-8	SIMPSON	2	0	36
81-10	LINDER	7	0	43
81-28	COBLE	3	0	44
81-52	ROBINSON II	0	0	40
81-68	WESTBROOK II	0	0	34
81-73	WALKER	1	0	37
<hr/>				
TOTALS	275	10	1914	

EXHIBIT AY-5

Cases in which the trial court denied counsel the opportunity to question potential jurors about considering life without parole as a sentence option in a capital murder case:

Sup. Ct. No. 76-60 GRIGSBY

Cases in which the trial court refused to disqualify potential jurors that could not consider life without parole as a sentence option in a capital murder case:

Sup. Ct. No. 80-69 SINGLETON

STATE'S EXHIBIT 2

Resume of Relevant Aspects of Shure's Study

BACKGROUND

With the resumption of the death penalty for some capital crimes in California and other states, a series of defense appeals has been entered in a number of pretrial hearings. One of these appeal issues is concerned with the exclusion of jurors who, when questioned during the pretrial voir dire, state they are unalterably opposed to the death penalty. The defense position contends that while such "scrupled" jurors are appropriately excluded from the penalty phase in a bifurcated trial, they nevertheless should be permitted to sit in the earlier guilt determination phase. The defense contends that research studies conducted by social scientists over the past decade repeatedly and consistently show that excluded scrupled jurors are less likely to convict in the guilt determination phase than the jurors who are willing to impose the death penalty (death qualified).

This conclusion is based on both survey questionnaire and simulation studies. Individuals in these studies are classified as "scrupled" or "death qualified" on the basis of their answer to a voir dire question of the kind asked of jurors prior to the jury trial. (EXAMPLE: Would you consider voting to impose the death penalty in at least some cases, or would you never be willing to impose it in any case, no matter what the evidence?) The findings from these studies show that in comparison to the death qualified juror, the excluded scrupled juror who answers "No" to this question is: less conviction prone on a scale measuring this attitude, more likely to vote not guilty in hypothetical cases, more liberal, less authoritarian, etc. The findings also indicate that the excluded scrupled juror is more likely to belong to demographic groups opposing the death penalty (Blacks, women, Mexican-Americans, Jews and Roman Catholics).

If these results hold for the courtroom setting, they suggest that death qualification question leads to exclusion of those jurors who are less conviction prone and unfairly creates a jury that is biased in the direction of finding the defendant guilty. The present study attempts to replicate procedures and findings obtained in earlier survey research studies and, in addition, correct two major flaws that seriously impair the interpretation of the significance of these studies for judging the bias in jury selection that might result from exclusion of jurors based on death qualification questioning.

The procedures used in earlier studies fall short in two critical respects: (1) The classification of individuals has been based on their response to a single qualification question that requires the individual to render a judgment with little opportunity for reflection on a relatively abstract issue, an issue with which s/he also is unlikely to have any direct experience. These considerations make it likely that the judgment obtained will be unreliable and subject to change. Indeed, even when assessing more familiar and concrete issues, researchers generally use a number of different items or questions to achieve reliable judgments. Court procedures also recognize that answers to such a question need to be scrutinized and provide the opportunity for the judge, and frequently both defense and prosecution, to clarify answers or "rehabilitate" jurors through a series of careful clarifying questions. (2) These earlier studies all fail to include any questions which provide for the identification of those individuals who would be excluded for cause along with the "scrupled" jurors but for a different reason: because they would always vote for the death penalty for certain crimes irrespective of any other

evidence presented. These might be labelled the automatic death penalty excludables.*

The present survey interviewing study then includes assessments made in earlier studies that allow the earlier comparisons between conviction proneness attitudes and juror death classification (Witherspoon excludables versus death qualifieds) to be replicated. In addition, this study includes (1) items to identify automatic death penalty excludables and (2) items and interviewing procedures that introduce the equivalent of a more probing examination that might be employed by either the court, the defense or the prosecution. This more extensive questioning procedure allows for a clarification of the individual's initial answer and lets us determine whether such additional questioning results in a shift in the death qualification classification.

METHOD

The data was collected in a telephone interviewing survey comparing a UCLA developed Computer-Assisted Telephone Interviewing system (Shure & Meeker, 1978) with telephone interviewing without such a system. Twenty experienced interviewers each completed twenty interviews for a total of 400 interviews. The respondents were selected by a systematic random sampling from the West Los Angeles Telephone Directory and randomly assigned to interviewers. The questionnaire consisted of a series of items measuring attitudes toward crime and the death penalty and included the ten-item Conviction

*It is of interest to note that in one of the most frequently cited articles on this topic, Juror (1971) noted that "Witherspoon was concerned with distinguishing and excluding those who 'would not vote for the death penalty regardless of the facts and circumstances of the case.' But if those who would never vote for the death penalty are to be excluded, so too should those who would always vote for it." (p. 591). For whatever set of reasons, researchers in this area have failed to attempt identification of those jurors who would always vote the death penalty in a case where the law allows it.

Proneness Scale (based on items 4CP through 8C5 and 13C through 17C in our questionnaire) developed by Ellsworth and Fitzgerald (1979) from an earlier one by Bronson (1970). Two criteria were used for juror classification. The first criterion is identical to that used by the above-mentioned authors to identify "Witherspoon Excludables" and "Death Qualifieds." (See example item cited on page 1 of this document.) A second criterion used the answer to the preceding item to evoke a series of additional questions as they might be presented by counsel for the defense and for the prosecution to clarify the respondents' opinions on the death penalty and how these opinions might influence their fairness as jurors in the case to be presented. The second criterion classification is based on the answer to the final item in this series in which each respondent was classified a second time as Witherspoon Excludable (WE), Death Qualified (DQ), or Automatic Death Penalty (ADP). After reading the facts in a hypothetical homicide case, the respondents were asked to judge the defendant's guilt and, if appropriate, decide on a penalty.

The use of items from earlier studies allowed us to replicate closely the procedures reported in recent studies affording us a basis for close comparison of our results with these studies. Furthermore, we should be able to show whether the additional procedures allowing more in-depth questioning result in reclassification of jurors that may alter or sustain the results reported in earlier studies.

SOME REVELANT RESULTS

In the computer printout tables which follow, Criterion 1 for juror classification is labelled ELLWRTH1. The Criterion 2 classification is labelled RECLASS1 in the computer printout tables.

Our first question is whether the relationship between the earlier used classification of the respondents (Criterion 1) is associated with conviction proneness.

Table 1 shows that the relationship reported in earlier studies is also found in our own analysis and is statistically significant (There is only one chance in ten thousand that the results are due to chance.) Respondents classified as DQ are more conviction prone than those classified as WE.

We next wanted to determine the extent and patterns of change in respondent classification based on the two criteria. Table 2 shows these results. A number of highly significant changes in respondent classification are found. 39.7% of those classified as DQ based on Criterion 1 are reclassified as ADP based on Criterion 2; 9.0% of the DQs were reclassified as WEs; 51.3% retained their original DQ classification. For the WEs, 94.9% retain their original classification and 5.1% shift to DQ. These results demonstrate vividly the considerable instability of the original classification and the importance of identifying the ADP group, a group that would also qualify for exclusion.

Table 3 examines the relationship between the second juror classification and conviction proneness. We again find a statistically significant relationship between juror classification and conviction proneness. Close examination of this table shows, not unexpectedly, that the greatest differences on conviction proneness are between the ADP and WE groups who are the most and least conviction prone, respectively. Inasmuch as the ADP come from those identified as DQs in the first classification, the new DQ group is significantly less conviction prone and closer to the WEs on this dimension.

Given the identification of ADP excludables, it is apparent that the proper comparison to determine if bias is created by exclusion of potential jurors as a result of the death qualification voir dire must be recast. The appropriate group to compare with the DQs is not the WEs but rather all of the excludables (WEs and ADPs). Table 4A presents this comparison. What we now find is that for our

sample of respondents there is a statistically significant relationship between juror classification and conviction proneness; however, we now have the surprising finding that it is the excludables who are more conviction prone than the DQs.

While our sample is from West Los Angeles, a wealthy, conservative community, we confess that we were taken aback by the large number of ADPs identified by our procedure. To reassure ourselves that the unexpectedly high frequency of ADPs was not solely responsible for the reversal noted, we arbitrarily assumed that the number of the ADPs in our sample were only half the obtained frequencies and recalculated our results. The results are shown in Table 4B. Though not as statistically significant as those in 4A, the results reveal the same reversal shown in that table: Excludables are more conviction prone than DQs. Finally, we repeated the same process in Table 4C where we again halved the number of ADP in Table B. Having reduced our ADPs to 25% of those we obtained in our sample, we finally reach a point where there is no statistically significant difference between excludables and DQ with respect to conviction proneness. Note, however, that even with the extreme assumption that the ADPs were only one-quarter as many as those obtained, we do not find the reverse direction of bias reported in earlier studies.

References

- Bronson E. "On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen," *University of Colorado Law Review*, 1970, 42:1.
- Ellsworth, P.C., and Fitzgerald, R. "Due Process vs. Crime Control: The Impact of Death Qualification on Jury Attitudes," Prepublication Draft, 1979.

Jurow, G.L. "New Data on the Effect of a 'Death Qualified' Jury on the Guilt Determination Process," *Harvard Law Review*, v. 84: 567-611, 1971.

Shure, G.H., and Meeker, R. "A Minicomputer System for Multiperson Computer-Assisted Telephone Interviewing," *Behavior Research Methods and Instrumentation*, 1978, 10:196.

***** C R O S S T A B U L A T I O N O F *****
 ELLWRTH1 ELLSWORTH -- NO NULLIFIERS BY CPSCALE2 ESTIMATED CONVICTION PRONENESS SCALE
 ***** PAGE 1 OF *****

CPSCALE2											
COUNT	1										
ROW PCT	IMCST	LIB									ROW
COL PCT	IERAL	FIF									TOTAL
TOT PCT	1	1	2	3	4	5					
ELLWRTH1	1	49	57	63	82	59	310				
DEATH QUALIFIED	1	15.8	18.4	20.3	26.5	19.0	84.0				
	1	67.1	79.2	84.0	94.3	95.2					
	1	13.3	15.4	17.1	22.2	16.0					
	2	24	15	12	5	3	59				
WITH EXCLUDABLE	2	40.7	25.4	20.3	8.5	5.1	16.0				
	2	32.9	20.8	16.0	5.7	4.8					
	2	6.5	4.1	3.3	1.4	1.9					
	9	13M	5M	5M	3M	5M	31M				
	9	0.0	0.0	0.0	0.0	0.0	0.0				
	9	0.0	0.0	0.0	0.0	0.0					
	9	0.0	0.0	0.0	0.0	0.0					
COLUMN TOTAL		73	72	75	87	62	369				
		19.8	19.5	20.3	23.6	16.8	100.0				

RAW CHI SQUARE = 29.28926 WITH 4 DEGREES OF FREEDOM. SIGNIFICANCE = 0.0000

NUMBER OF MISSING OBSERVATIONS = 31

Table 1. A Comparison Between Juror Classification Based on Criterion 1
 (a single-item criterion) and Conviction Proneness

The values in each cell are as follows:

N	←	frequency or number of cases in that cell
%	←	row percent--the percentage of cases in that row that are in that cell
%	←	column percent--the percentage of cases in that column that are in that cell
%	←	table percent--the percentage of cases in the table that are in that cell

CROSSTABS OF PRIMARY SPRING '80 VARIABLES
 FILE JURYS80 (CREATION DATE = 06/06/80)

06/06/80

PAGE 1

***** C R O S S T A B U L A T I O N O F *****
 ELLWRTH1 ELLSWORTH -- NO NULLIFIERS BY RECLASS1 RECLASS -- NO NULLIFIERS
 ***** PAGE 1 *****

		RECLASS1					ROW TOTAL	
COUNT		1	2	3	9			
ROW PCT	COL PCT	DEATH QUALIFIED	WITH EXCL	ADP				
TOT PCT		1	2	3	9			
ELLWRTH1								
1		159	28	123	0M		310	
DEATH QUALIFIED		51.3	9.0	39.7	0.0		84.0	
		58.1	33.3	100.0	0.0			
		43.1	7.6	33.3	0.0			
2		3	56	0	0M		59	
WITH EXCLUDABLE		5.1	94.9	0.0	0.0		16.0	
		1.9	66.7	0.0	0.0			
		0.8	15.2	0.0	0.0			
9		0M	0M	0M	31M		31M	
		0.0	0.0	0.0	0.0		0.0	
		0.0	0.0	0.0	0.0			
		0.0	0.0	0.0	0.0			
COLUMN TOTAL		162	84	123	31M		369	
		43.9	22.8	33.3	0.0		100.0	

RAW CHI SQUARE = - 208.11459 WITH 2 DEGREES OF FREEDOM. SIGNIFICANCE = - 0.0
 NUMBER OF MISSING OBSERVATIONS = 31

Table 2. A Comparison Between Two Criteria of Juror Classification:
 Criterion 1 (single-item criterion) and Criterion 2 (response
 to last item asked in voir dire item series)

CROSSTABS OF PRIMARY SPFING '80 VARIABLES

06/06/80

PAGE

FILE JURYS80 (CREATION DATE = 06/06/80)

***** C R O S S T A B U L A T I O N O F *****
 RECLASS1 RECLASS -- NO NULLIFIERS BY CPSCALE2 ESTIMATED CONVICTION PRON'TN'SS S
 ***** PAGE

CPSCALE2									
	CCUNT	1							
	ROW PCT	IMCST	LIB					MOST CON	ROW
	COL PCT	IEFAL	FIF					SER FIFT	TOTAL
	TOT PCT	1	2	3	4	5			
RECLASS1									
	1	39	37	39	35	12			162
DEATH QUALIFIED		24.1	22.8	24.1	21.6	7.4			43.9
		53.4	51.4	52.0	40.2	19.4			
		10.6	10.0	10.6	9.5	3.3			
	2	29	21	18	12	4			84
WITH EXCLUDABLE		34.5	25.0	21.4	14.3	4.8			22.8
		35.7	29.2	24.0	13.8	6.5			
		7.9	5.7	4.9	3.3	1.1			
	3	5	14	19	40	46			123
ADP		4.1	11.4	14.6	32.5	37.4			33.3
		6.8	19.4	24.0	46.0	74.2			
		1.4	3.8	4.9	10.8	12.5			
	9	134	5M	5M	3M	5M			31M
		0.0	0.0	0.0	0.0	0.0			0.0
		0.0	0.0	0.0	0.0	0.0			
		0.0	0.0	0.0	0.0	0.0			
	COLUMN	73	72	75	87	62			369
	TCTAL	19.8	19.5	20.3	23.6	16.8			100.0

RAW CHI SQUARE = 89.93376 WITH 8 DEGREES OF FREEDOM. SIGNIFICANCE = 0.0000

NUMBER OF MISSING OBSERVATIONS = 31

p16

Table 4. A Comparison Between Death Qualified (DQ) and All Excludables Combined (WE and ADP) on the Conviction Proneness Scale (Juror classifications are based on Criterion 2)

Table 4A. Comparison Between Death Qualified (DQ) and All Excludables Combined

CONVICTION PRONENESS SCALE SCORE						
	Lowest Quintile		Highest Quintile		Total	
DQ	N	39	37	39	35	12
	%	24.1	22.8	24.1	21.6	7.4
All WE	N	34	35	36	52	50
+All ADP	%	16.4	16.9	17.4	25.1	24.2
TOTALS		73	72	75	87	62
$\chi^2 = 21.969$, $df = 4$, $p = .001$						
						369

Table 4B. Same as Table A but assumes 50% reduction in ADP.

	Lowest Quintile		Highest Quintile		Total	
DQ	N	39	37	39	35	12
	%	24.1	22.8	24.1	21.6	7.4
All WE	N	32	28	27	32	27
+ $\frac{1}{2}$ ADP	%	21.9	19.2	18.5	21.9	18.5
TOTALS		71	65	66	67	39
$\chi^2 = 9.215$, $df = 4$, $p = .056$						
						303

Table 4C. Same as Table A but assumes 75% reduction in ADP.

	Lowest Quintile		Highest Quintile		Total	
DQ	N	39	37	39	35	12
	%	24.1	22.8	24.1	21.6	7.4
All WE	N	30	25	23	22	16
+ $\frac{1}{4}$ ADP	%	25.9	21.6	19.8	19.0	13.8
TOTALS		69	62	62	57	28
$\chi^2 = 3.650$, $df = 4$, $p = .455$						
						278

Table 5. A Hypothetical Comparison Between DQ and WE in Which the ADP Are Reassigned in Various Proportions to DQ and WE
(The purpose of these hypothetical analyses is to determine the effect of additional rehabilitation of various proportions of ADP to the DQ group beyond the rehabilitation achieved in the survey interview questioning.)

Table 5A. Comparison Between DQ Augmented by 25% of ADP and WE Plus 75% ADP

CONVICTION PRONENESS SCALE SCORE							
Lowest Quintille			Highest Quintille			Total	
DQ + 25% ADP	N	40	41	44	45	24	194
WE + 75% ADP	N	33	32	32	42	39	178
TOTALS		73	73	76	87	63	372

Frequencies are rounded to nearest whole number.

$$\chi^2 = 6.675, df = 4, p = .154$$

Table 5B. Comparison Between DQ and WE in Which Each Group is Assigned 50% of ADP

	Lowest Quintille					Highest Quintille	Total
DQ + 50% ADP	N	42	44	48	55	35	224
WE + 50% ADP	N	32	28	27	32	27	146
TOTALS		74	72	75	87	62	370

Frequencies are rounded to nearest whole number.

$$\chi^2 = 1.524, df = 4, p = .822$$

Table 5C. Comparison Between DQ Augmented by 75% of ADP and WE Plus 25% ADP

		Lowest Quintille		Highest Quintille			Total
DQ + 75% ADP	N	44	48	53	65	47	257
WE + 25% ADP	N	30	25	23	22	16	116
TOTALS		74	73	76	87	63	373

Frequencies are rounded to nearest whole number.

$$\chi^2 = 5.768, df = 4, p = .217$$

Table 6. Comparisons Between Juror Classifications AND
Vote on Guilt or Innocence of the Accused.
Table 6A Comparison Using Ellsworth - Fitzgerald
Classification: How would you find the
accused?

Items 30A + 34B COMBINED	Ellsworth (Nullifiers Omitted)		
	Death Qualified	Withstand Excludables	Row Total
Guilty	162	29	197
Not Guilty	90	17	107
Column Total	252	46	304

$$X^2 = .074 \quad df = 1 \quad p = .214$$

Table 6B. Comparison Using Revised Classification

Including Automatic Death Penalty Excludables
How would you find the accused?

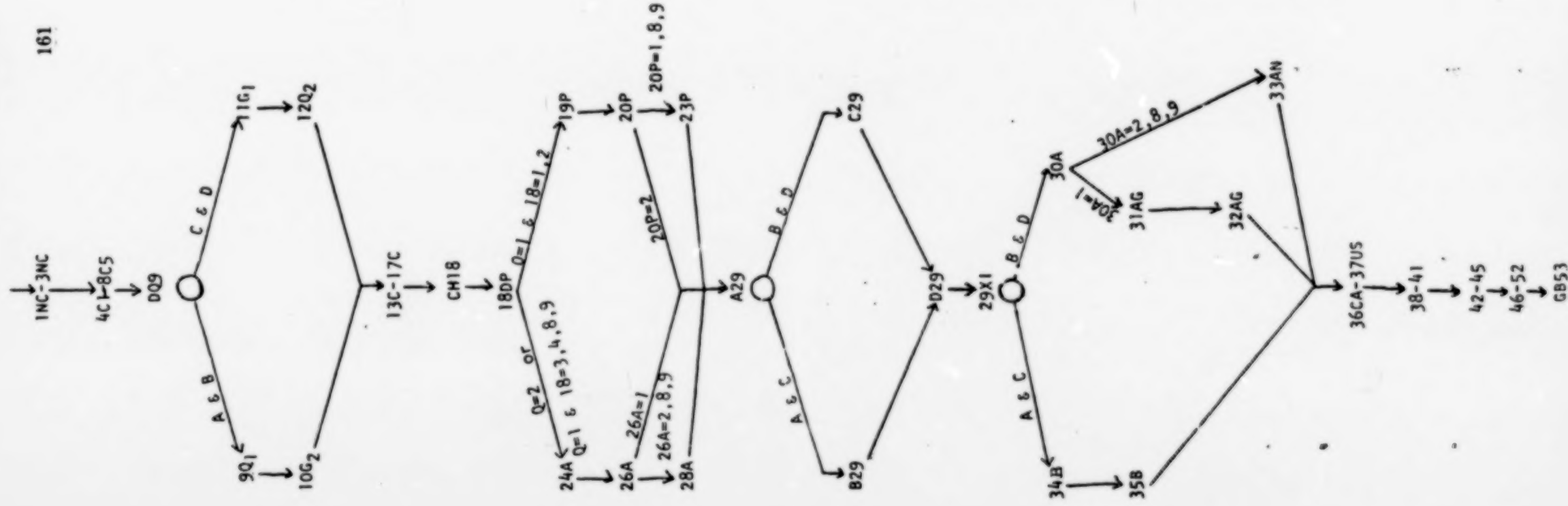
Items 30A + 34B
COMBINED

	Reclusive (Nullifiers Omitted)		
	With. Excludables	Death Qualified	Automatic Death Penalty Row Total
Guilty	37	85	75
Not Guilty	30	46	31
Column Total	67	131	106
			304

$$X^2 = 4.342 \quad df = 2 \quad p = .881$$

Table 6C. Comparison Between All-Excludables (Witherspoon)
Excludables and Automatic Death Penalty and
Death Qualified.

	All Excludables	Death Qualified	Row Total
Guilty	112	85	197
Not Guilty	61	46	107
Column Totals	173	131	304



National Crime Study Items
(Perception of Crime)

Conviction Proneness Scale items
(Items 4-8)

Each respondent is assigned to
Condition A, B, C, or D
A & B: Death Qualification Item
followed by Nullification

Item
C & D: Nullification Item
followed by Death
Qualification Item

Q: Death Qualification Item
G: Nullification Item

Conviction Proneness Scale Items
(Items 13-17)

CH18: Murder Charge

Opinion on Death Penalty

Voir Dire

19P-20P: Prosecution Questioning

21P-23P: Defense Questioning

24A-26A: Defense Questioning

27A-28A: Prosecution Questioning

Conditions A & C: Bifurcated
Jury with Death Penalty as Maximum
Penalty

Conditions B & D: Single Jury
with Life Imprisonment without
Parole as Maximum Penalty

Summary of Case

Estimated Likelihood of Guilt

Vote Guilty or Not Guilty Item
(30A or 34B)

Vote on Sentence if Accused Is Four:
Guilty (31AG or 35B)

Hypothetical Vote on Sentence of
Accused if Death Sentence is
Possible (32AG)

Hypothetical Vote on Sentence of
Accused if Assigned to Second Jury
(33AN)

Perception of Others on Death
Penalty

Prior involvement with criminal
cases

Demographic Information

Interview information and ratings

End Interview

PETITIONER'S BRIEF

⑧
No. 84-1865

Supreme Court, U.S.
FILED

NOV 25 1985

JOSEPH F. SPANIOLO, JR.
CLERK

**In the
Supreme Court of the United States**

October Term, 1985

A.L. Lockhart, Director,
Arkansas Department of Correction *Petitioner*

V.

Ardia V. McCree *Respondent*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF OF PETITIONER

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65

QUESTIONS PRESENTED

1. Whether the State's interests in removing biased jurors from the penalty phase of a capital murder trial and in seating only one jury to try both phases of such a trial outweigh a capital defendant's interest in seating such jurors in the guilt phase?

2. Whether the constitutional guarantee of an impartial jury allows the exclusion for cause from the guilt phase of a capital murder trial of all jurors who can properly be excluded for cause from the penalty phase because of their refusal to follow the law and the instructions of the court?

3. Whether, for purposes of a representative cross-section analysis pursuant to the Sixth and Fourteenth Amendments, this Court's precedents prohibit finding a group "cognizable" solely because of the attitudes of its members?

4. Whether the Eighth Circuit erred in relying on circumstantial social-science research evidence involving unrealistic simulations to conclude that jurors properly excludable for cause from the penalty phase of a capital murder trial must be seated in the guilt phase of such a trial?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES	iv
PARTIES	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	6
ARGUMENT	8
I. ARKANSAS' JURY SELECTION PRO- CEDURES ARE CONSTITUTIONAL BE- CAUSE THE STATE IS JUSTIFIED BOTH (1) IN EXCLUDING JURORS IN THE GUILT PHASE OF A CAPITAL MURDER TRIAL WHO WILL NOT FOLLOW THE LAW IN THE PENALTY PHASE AND (2) IN TRYING BOTH PHASES OF CAPI- TAL CASE BEFORE THE SAME JURY	8
II. THE EIGHTH CIRCUIT'S LEGAL CON- CLUSIONS ARE BASED ON IMPROPER CONSTITUTIONAL ANALYSES	19
A. THE EIGHTH CIRCUIT IM- PROPERLY IMPUTED BIAS TO ALL DEATH-QUALIFIED JURORS	22

B. THE EIGHTH CIRCUIT ERRED AS A MATTER OF FACT AND LAW IN FINDING A SIXTH AMEND- MENT CROSS-SECTION VIOLATION	30
1. "DEATH-QUALIFIED" JURORS ARE NOT A DISTINCTIVE GROUP FOR CROSS-SECTION PURPOSES	32
2. THE CROSS-SECTION REQUIRE- MENT SHOULD NOT BE APPLIED TO PETIT JURIES ON THESE FACTS	39
III. THE EIGHTH CIRCUIT'S FACTUAL FINDINGS ARE BASED ON IN- HERENTLY UNRELIABLE CIRCUM- STANTIAL EVIDENCE	40
A. THE LOWER COURTS' FINDINGS THAT THE BEHAVIOR OF REAL JURORS CAN BE PREDICTED FROM THE ATTITUDES OF LABORA- TORY AND SURVEY SUBJECTS ARE NOT THE PROPER BASIS FOR ESTABLISHING CON- STITUTIONAL FACTS	43
B. WEs AND DGs WERE NOT RELIABLY IDENTIFIED IN THE STUDIES	44
C. THE RESEARCH RELIED UPON BY THE EIGHTH CIRCUIT COM- PARES THE WRONG GROUPS AND ATTEMPTS TO PROVE THE WRONG THING	45

D. CONSTITUTIONAL FACTS AND SWEEPING CHANGES IN CONSTITUTIONAL LAW SHOULD NOT BE BASED ON PSEUDO-SCIENTIFIC STUDIES CRITICIZED EVEN WITHIN THE PSYCHOLOGICAL COMMUNITY	46
--	----

CONCLUSION	51
------------------	----

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Adams v. Texas</i> , 448 U.S. 38 (1980)	12, 17, 18, 30, 36, 37, 45
<i>Alexander v. Louisiana</i> , 405 U.S. 625 (1972)	32
<i>Anderson v. Bessemer City</i> , 84 L.Ed.2d 518 (1985)	21
<i>Apodaca v. Oregon</i> , 406 U.S. 404 (1972)	40
<i>Ashe v. Swenson</i> , 397 U.S. 436 (1970)	21
<i>Ballard v. United States</i> , 329 U.S. 187 (1946)	32
<i>Ballew v. Georgia</i> , 435 U.S. 223 (1978)	16, 24, 33, 40, 49
<i>Barfield v. Harris</i> , 540 F.Supp. 451 (G.D.N.C. 1982)	27
<i>Boggs v. Commonwealth</i> , 331 S.E.2d 407 (Va. 1985)	38

<i>Bose Corp. v. Consumer Union of the United States, Inc.</i> 104 S.Ct. 1949 (1984)	41
<i>Britton v. Rogers</i> , 631 F.2d 572 (8th Cir. (1980)	16
<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968)	26
<i>Chadderton v. State</i> , 54 Md. App. 86, 456 A.2d 1313 (1983)	27, 38
<i>Clark v. State</i> , 451 So.2d 368 (Ala. Cr.App. 1984)	27
<i>Cobbs v. Robinson</i> , 528 F.2d 1313 (2nd Cir. 1975)	34
<i>Coble v. State</i> , 274 Ark. 134, 624 S.W.2d 421 (1981), <i>cert. denied</i> , 456 U.S. 1008 (1982)	27
<i>Collins v. State</i> , 259 Ark. 8, 531 S.W.2d 13 (1975), <i>vacated in part</i> , 428 U.S. 153 (1976), <i>aff'd in</i> 261 Ark. 336, 548 S.W.2d 135, <i>cert. denied</i> , 434 U.S. 878 (1977)	16
<i>Commonwealth v. McAlister</i> , 365 Mass. 454, 313 N.E.2d 113 (1974), <i>cert. denied</i> , 419 U.S. 1115 (1975)	27
<i>Commonwealth v. Morales</i> , 494 A.2d 367 (Pa. 1985)	27, 38
<i>Commonwealth v. Story</i> , 440 A.2d 488 (1981)	27, 38
<i>Commonwealth v. Szuchon</i> , 484 A.2d 1365 (Pa. 1984)	27

<i>Craig v. Wyse</i> , 373 F.Supp. 1008 (D. Col. 1974)	27
<i>Dennis v. U.S.</i> , 339 U.S. 162 (1949)	29
<i>Dobbert v. Florida</i> , 431 U.S. 282 (1977)	22
<i>Dongan v. State</i> , 470 So.2d 697 (Fla. 1985)	27, 38
<i>Douthit v. State</i> , 239 Ga. 81, 235 S.E.2d 493 (1977)	27
<i>Duren v. Missouri</i> , 439 U.S. 357 (1979)	7, 11, 12, 28, 30, 32, 39
<i>Fielden v. State</i> , 437 N.E.2d 986 (Ind. 1982)	27, 38
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	37, 49
<i>Grigsby v. Mabry</i> , 483 F.Supp. 1372, 1375 (E.D. Ark. 1980)	4, 31
<i>Grigsby v. Mabry</i> , 637 F.2d 525, 527 (8th Cir. 1980)	4, 9
<i>Hager v. State</i> , 665 P.2d 319 (Okla. Crim. App. 1983)	27
<i>Harrell v. State</i> , 249 Ark. 48, 288 S.E.2d 192 (1982)	27, 38
<i>Hayes v. Missouri</i> , 120 U.S. 68 (1887)	13
<i>Hendrickson v. State</i> , 285 Ark. 462, 688 S.W.2d 295 (1985)	27, 38
<i>Hernandez v. Texas</i> , 347 U.S. 475 (1954)	32

<i>Hogue v. State</i> , 652 P.2d 300 (Okla. Crim. App. 1982)	27
<i>Hovey v. Superior Court</i> , 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 1238 (1980)	27
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	22, 25, 26
<i>Jacobellis v. Ohio</i> , 378 U.S. 184 (1964)	21
<i>Justus v. Commonwealth</i> , 222 Va. 667, 283 S.E.2d 905 (1981)	27
<i>Keeten v. Garrison</i> , 578 F.Supp. 1164 (W.D.N.C.), <i>rev'd</i> , 742 F.2d 129 (4th Cir. 1984)	38
<i>Keeten v. Garrison</i> , 742 F.2d 129 (4th Cir. 1984), <i>petition for cert. filed</i> , ___ U.S.L.W. ___ (U.S. Feb. 2, 1985) (No. 84-6187)	13, 27, 38
<i>Lockett v. Ohio</i> , 437 U.S. 586 (1978)	17, 35, 36
<i>Marshall v. Lonberger</i> , 459 U.S. 422 (1983)	22
<i>Martin v. Blackburn</i> , 521 F.Supp. 685 (E.D.La. 1981)	38
<i>Mattheson v. King</i> , 751 F.2d 1432 (5th Cir. 1985)	27, 38
<i>McClesky v. Kemp</i> , 753 F.2d 877 (11th Cir. 1985), <i>petition for cert. filed</i> ___ U.S.L.W. ___ (U.S. May 28, 1985) (No. 84-6811)	27, 38, 49

<i>McCorquodale v. Balkcom</i> , 525 F.Supp. 408 (N.D. Ga. 1981), <i>sentence vacated on</i> <i>other grounds</i> , 705 F.2d 1553 (11th Cir. 1983)	38
<i>McCree v. State</i> , 266 Ark. 465, 585 S.W.2d 938 (1979)	3
<i>Mincey v. State</i> , 251 Ga. 255, 304 S.E.2d 882 (1983)	38
<i>Mitchell v. Hopper</i> , 538 F.Supp. 77 (S.D. Ga. 1982)	27
<i>Murphy v. Florida</i> , 421 U.S. 794 (1975)	22
<i>Needham v. State</i> , 215 Ark. 935, 224 S.W.2d 785 (1949)	11
<i>Nettles v. State</i> , 409 So.2d 85 (Fla. App. 1982).	27, 38
<i>Nichols v. State</i> , 690 P.2d 463 (Okla. Crim. App. 1984)	27
<i>Norris v. Alabama</i> , 274 U.S. 587 (1935)	41
<i>Patton v. Yount</i> , 104 S.Ct. 2885 (1984)	18, 21, 22, 25
<i>People v. Cabellero</i> , 464 N.E.2d 223 (Ill. 1984)	27
<i>People v. Collins</i> , 478 N.E.2d 267 (Ill. 1985)	27
<i>People v. Fields</i> , 35 Cal.3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983)	38

<i>People v. Free</i> , 447 N.E.2d 218 (Ill. 1983)	38
<i>People v. Holman</i> , 469 N.E.2d 119 (Ill. 1984)	27, 38
<i>People v. Robinson</i> , 432 N.E.2d 1195 (Ill. App. 1982)	38
<i>People v. Smith</i> , 469 N.E.2d 634 (Ill. App. 1 Dist. 1984)	38
<i>Poole v. State</i> , 295 Md. 167, 453 A.2d 1218 (1983)	27
<i>Pope v. U.S.</i> , 372 F.2d 710 (8th Cir. 1967), <i>vacated on other grounds</i> , 392 U.S. 651 (1968)	27, 39
<i>Poyner v. Commonwealth</i> , 329 S.E.2d 815 (Va. 1985)	27, 38
<i>Rector v. State</i> , 280 Ark. 385, 659 S.W.2d 168 (1983), <i>cert. denied</i> , 104 S.Ct. 2370 (1984)	10, 11, 14, 15, 26, 27, 38
<i>Roberts v. Louisiana</i> , 428 U.S. 325 (1976)	49
<i>Rosales-Loper v. U.S.</i> , 451 U.S. 182 (1981)	18, 29
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966)	23, 41
<i>Sinclair v. Turner</i> , 447 F.2d 1158 (10th Cir. 1971)	38
<i>Smith v. Balkcom</i> , 660 F.2d 573 (1981), <i>modified</i> , 671 F.2d 858, <i>cert.</i> <i>denied</i> , 459 U.S. 882 (1982)	12, 24, 27, 38

<i>Smith v. Phillips</i> , 455 U.S. 209 (1982)	29
<i>Spinkellink v. Wainwright</i> , 578 F.2d 582 (5th Cir. 1978), <i>cert. denied</i> , 440 U.S. 976 (1979)	13, 27, 38
<i>Stephens v. State</i> , 277 Ark. 113, 640 S.W.2d 94 (1982)	15
<i>Swain v. Alabama</i> , 380 U.S. 202 (1965)	13
<i>State v. Bare</i> , 305 S.E.2d 531 (N.C. 1983), <i>relying on State v. Williams</i> , 292 S.E.2d 243 (N.C. 1982), <i>cert. denied</i> , 103 S.Ct. 474 (1982)	27, 38
<i>State v. Bartholomew</i> , 98 Wash. 2d 173, 654 P.2d 1170 (1982)	27
<i>State v. Bass</i> , 189 N.J. Super. 461, 460 A.2d 223 (1983)	27, 38
<i>State v. Blount</i> , 472 A.2d 1340 (Del. Super. 1984)	27
<i>State v. Butler</i> , 462 So.2d 1280 (La. App. 5th Cir. 1985)	27, 38
<i>State v. Campbell</i> , 210 Kan. 265, 500 P.2d 21 (1972)	27
<i>State v. Coleates</i> , 53 A.D.2d 1018, 386 N.Y.S.2d 525 (1976)	25
<i>State v. Davis</i> , 653 S.W.2d 167 (Mo. 1983)	27
<i>State v. Follins</i> , 672 S.W.2d 167 (Mo. App. 1984)	38

<i>State v. Guinan</i> , 665 S.W.2d 325 (Mo. 1984)	27
<i>State v. Hyman</i> , 276 S.C. 559, 281 S.E.2d 209 (1981), <i>cert. denied</i> , 102 S.Ct. 3510 (1982)	38
<i>State v. Lamb</i> , 213 Neb. 498, 330 N.W.2d 462 (1983)	27
<i>State v. Nave</i> , 694 S.W.2d 729 (Mo. 1985)	27, 38
<i>State v. Ortiz</i> , 88 N.M. 370, 540 P.2d 850 (1975)	27
<i>State v. Peacock</i> , 330 S.E.2d 190 (N.C. 1985)	38
<i>State v. Perry</i> , 420 So.2d 139 (La. 1982), <i>cert. denied</i> , 103 S.Ct. 2438 (1983)	38
<i>State v. Peyton</i> , 29 Wash. App. 701, 630 P.2d 1362 (1981)	27
<i>State v. Pinch</i> , 292 S.E.2d 203, <i>cert. denied</i> , 103 S.Ct. 474 (1982)	38
<i>State v. Preston</i> , 673 S.W.2d 1 (Mo. 1984)	38
<i>State v. Ramirez</i> , 116 Ariz. 259, 569 P.2d 201 (1977)	27, 38
<i>State v. Strouth</i> , 620 S.W.2d 467 (Tenn. App. 1981), <i>cert. denied</i> , 455 U.S. 983 (1982)	27
<i>State v. Taylor</i> , 283 S.E.2d 761 (1981)	38
<i>State v. Truesdale</i> , 296 S.E.2d 528 (S.C. 1982)	25

XII

<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1888)	32
<i>Taylor v. Louisiana</i> , 419 U.S. 522, 538 (1975)	6, 7, 12, 19, 31, 32, 39
<i>Thiel v. Southern Pacific Co.</i> , 328 U.S. 217 (1946)	32
<i>Tunney v. Ohio</i> , 273 U.S. 510 (1927)	23
<i>Tuberville v. U.S.</i> , 303 F.2d 411, cert. denied, 370 U.S. 946 (1962)	38, 39
<i>Turner v. Arkansas</i> , 704 U.S. 366 (1972)	21
<i>United States ex rel. Clark v. Fike</i> , 538 F.2d 750 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1972)	27, 38
<i>United States v. Engle</i> , 586 F.2d 1193 (8th Cir. 1978)	25
<i>United States v. Gibson</i> , 480 F.Supp. 339 (S.D. Ohio 1979)	34
<i>United States v. Haldeman</i> , 559 F.2d 31, (D.C. Cir. 1976), cert. denied, 413 U.S. 933 (1977)	25
<i>United States v. Long Elk</i> , 565 F.2d 1032 (8th Cir. 1977)	25
<i>United States v. Mandel</i> , 431 F.Supp. 90 (D. Md. 1977)	25
<i>United States v. Marshall</i> , 471 F.2d 1051 (D.C. Cir. 1972)	27

XIII

<i>United States v. Potter</i> , 552 F.2d 901 (9th Cir. 1977)	33, 34
<i>United States v. Puff</i> , 211 F.2d 171 (2nd Cir. 1954), cert. denied, 347 U.S. 964 (1954)	38
<i>United States v. Test</i> , 550 F.2d 577 (10th Cir. 1976)	34
<i>United States v. U.S. Gypsum Co.</i> , 333 U.S. 364 (1948)	21
<i>United States v. Wood</i> , 299 U.S. 123 (1936)	29
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1972)	18
<i>Wainwright v. Witt</i> , 105 S.Ct. 844, 852 (1985)	Passim
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968)	Passim
STATUTORY PROVISIONS:	
Ark. Stat. Ann. §41-901 (Repl. 1977)	16
Ark. Stat. Ann. §41-1301(3) (Repl. 1977)	15, 18
Ark. Stat. Ann. §41-1302 (Repl. 1977)	16
Ark. Stat. Ann. §41-1501(1)(a)-(g) (Repl. 1977)	3, 16
Ark. Stat. Ann. §41-1502 (Repl. 1977)	16
Fed. R. Civ. P. 52 (a)	21
28 U.S.C. §2254(d)	25

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PARTIES

The parties to this proceeding are A.L. Lockhart, petitioner, and Ardia V. McCree, respondent. A.L. Lockhart is the director of the Arkansas Department of Correction and is the successor to the former parties James Mabry and Vernon Housewright. Although this case originally involved the consolidated habeas petitions of James T. Grigsby and Ardia V. McCree. Grigsby died before the district court entered a judgment in the case. As such, both the judgment entered by the district court and the Eighth Circuit apply only to McCree.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Mabry v. Grigsby*, 758 F.2d 226 (8th Cir. 1985) and is reprinted in slip opinion form in the Appendix to the Petition for Certiorari. The opinion of the United States District Court for the Eastern District of Arkansas is reported as *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983) and is reprinted in the Supplemental Appendix to the Petition for Certiorari.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit *en banc* was filed on January 30, 1985. A petition for rehearing was not filed. On April 10, 1985, Justice Harry A. Blackmun entered an order extending the time for filing a Petition for a Writ of Certiorari in this case to and including May 30, 1985. The Petition for Certiorari was filed on May 29, 1985. Certiorari was granted by the Court on October 7, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ark. Stat. Ann. § 41-1301 (Repl. 1977), provides in pertinent part:

The following procedures shall govern trials of persons charged with capital murder:

• • •

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302 [§41-1302]; . . .

STATEMENT OF THE CASE

Mr. McCree,¹ the respondent in this case, was charged with capital murder in violation of Ark. Stat. Ann. §41-1501 (Repl. 1977). It was alleged that McCree committed the crime on February 14, 1978, in the course of a robbery at La Tienda Gift Shop and Service Station in Camden, Arkansas. Evelyn Boughton, the owner and operator of La Tienda, was shot and killed.

McCree was tried before a jury and because the State sought the death penalty, the jury was qualified in accordance with *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Those jurors who could not consider the death penalty as punishment for the crime were removed for cause by the State at voir dire. The jury found McCree guilty of capital murder on May 12, 1978, and set his punishment at life imprisonment without parole. McCree had filed a written motion, after his jury had been selected and after he had been found guilty but prior to the penalty phase of his trial, alleging that trial by a death-qualified jury violated his right both to a representative and an impartial jury. Trial Transcript at 12-13.

McCree appealed his conviction to the Arkansas Supreme Court and the conviction was affirmed in *McCree v. State*, 266 Ark. 465, 585 S.W.2d 938 (1979). A petition seeking post-conviction relief was denied in an unpublished per curiam opinion on November 7, 1980. 271 Ark. xxvii.

On December 23, 1980, McCree filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of Arkansas, Pine Bluff Division. *McCree v. Housewright*, No. PB-C-80-429. His petition alleged *inter alia* that he had been denied the right to a fair and impartial jury as required by the Sixth and Fourteenth Amend-

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The parties are referred to herein as the State (petitioner) and McCree (respondent).

ments. J. App. 5. By stipulation of the parties, this ground of McCree's petition was consolidated with Grigsby's case, *Grigsby v. Mabry*, No. PB-C-78-32, for a hearing and disposition. J.App. 9.² An evidentiary hearing in the consolidated cases was held before the Honorable G. Thomas Eisele in July 1981. The Court received in evidence a number of studies about the effect of excluding WEs from the guilt phase of capital trials.

On August 5, 1983, the district court rendered its opinion granting McCree habeas relief.³ (Supp. App. 2) The district court found that both the Sixth Amendment right to have a jury selected from a representative cross-section of the community, and the Fourteenth Amendment due process right to have an impartial jury were violated when a defendant in a capital case was tried before a "death-qualified" jury. (Supp. App. 125-133) The court ordered that in all capital cases the State of Arkansas must use separate juries for the guilt and punishment phases of trial. (Supp. App. 119-25)

On January 30, 1985, the *en banc* Court of Appeals for the Eighth Circuit affirmed the district court by a 5-4 vote.

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The present case was originated by James T. Grigsby who was convicted of capital murder by a "death-qualified" jury and sentenced to life without parole in 1978 in an Arkansas state court. He sought federal habeas corpus relief and after an evidentiary hearing in 1979, the United States District Court for the Eastern District of Arkansas rejected the allegation that "death-qualified" juries violate the representative cross-section requirement of the Sixth Amendment to the United States Constitution but ordered the state court to afford Grigsby an evidentiary hearing on the issue of conviction-proneness of such juries. *Grigsby v. Mabry*, 483 F.Supp. 1372 (E.D. Ark. 1980). On appeal, the Eighth Circuit Court of Appeals remanded, ordering that the evidentiary hearing be held in the district court. *Grigsby v. Mabry*, 637 F.2d 525 (8th Cir. 1980).

3

Before the decision was rendered, Grigsby died at the Cummins Unit of the Arkansas Department of Correction.

The majority, in an opinion authored by Chief Judge Lay, concluded that there was "substantial evidence" to support the finding that a jury from which WEs have been barred "is in fact conviction prone and, therefore, does not constitute a cross-sectional representation in a given community." (App. A7) It, too, placed considerable reliance on the social science research in this area. In view of its finding on this point, the court deemed it unnecessary to discuss the alternate argument that the juries in the McCree and Grigsby cases were in fact biased. (App. A7) The court also refused to require that the state utilize two separate juries, instead leaving "the actual procedural remedy to the discretion of the state." (App. A7)

Judge Gibson, joined by Judges Ross, Fagg, and Bowman, dissented. He argued that the excluded group in this case — WEs — is not the kind of "cognizable" class that gives rise to a valid claim that the jury was not drawn from a representative cross section of the community. (App. A42-A46) He further argued that the state interests in a unitary jury for all phases of capital trials are sufficient to outweigh any claim of this kind.

(App. A47-A49) Finally, he argued that there is no evidence that would justify the conclusion that respondent's jury, by virtue of the exclusion of WEs, was biased in favor of the prosecution. (App. A49-A53)

SUMMARY OF ARGUMENT

The decision below seriously distorts the constitutional guarantee of the rights to an impartial jury and to a jury drawn from a fair cross-section of the community. Unless it is reversed, the decision will mean that federal courts will be authorized to supervise the structure of state jury systems and state trial procedure. A proper constitutional analysis under the Sixth and Fourteenth Amendments recognizes that the State has an interest in excluding jurors who cannot follow the law and has broad discretion in fashioning its jury selection procedures. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). These interests are manifestly and primarily advanced by the exclusions inherent in the death qualification process. It is undisputed that the persons excluded from McCree's jury may properly be excluded from the sentencing phase. The natural result of the State's unitary jury system is that these persons must also be excluded from the guilt phase. Thus, in effect, the decision below interprets the Constitution to require that the State abolish its unitary jury system in order to include WEs on the jury at the guilt phase.

The Eighth Circuit has failed to examine the State's real and articulated interests in a unitary jury system to determine if they are justified. Instead of balancing the interests and granting any leeway in applying the cross-section principle, the Eighth Circuit has created a overbroad rule of inclusion which is not constitutionally mandated. An examination and balancing of the State's interests under the Sixth and Fourteenth Amendments reveals that Arkansas capital jury selection procedures are constitutional.

This Court's decisions make clear that a jury is considered impartial if it is composed of jurors "who will conscientiously apply the law and find the facts." *Wainwright v. Witt*, 105 S.Ct. 844, 852 (1985). McCree's evidence fails to address this point. The finding by the

district court that a jury without WEs is more likely to convict than one with WEs cannot be equated with a showing of bias, as the Eighth Circuit apparently recognized. Moreover, the reliance on *Witherspoon v. Illinois*, 391 U.S. 510 (1968), by the district court as the principal authority for its impartiality decision was misplaced.

This Court has held that the cross-section requirement applies only to those groups that are perceived, by themselves or others in society, as a "distinctive" segment of the community. See *Duren v. Missouri*, 439 U.S. 357 (1979). The lower courts found WEs to be a "cognizable" group based on nothing more than their purported attitudes toward the criminal justice system. While attitudes may be a factor in determining distinctiveness and cognizability, no court has previously held, as did the district court, that attitudes alone are sufficient to define such a group. Traditional analyses have found cognizable groups based on sex, race, and ethnic origin which are vastly different from the heterogeneous and fluid group recognized in this case.

Further, the lower courts improperly applied the cross-section requirement to a petit jury, despite the holding in *Taylor* that the requirement applies only to "jury wheels, pools of names, panels or venires." *Id.*, 419 U.S. at 538.

These unprecedented expansions of the cross-section requirement are totally unjustified, since they are based on highly suspect circumstantial evidence which imputes the attribute of laboratory subjects to *all* jurors qualified under *Witherspoon* and its progeny.

The foundation for the factual findings of both lower courts is McCree's social science research evidence. Since it is purported to show the bias of McCree's jury and since it is the basis for finding "constitutional facts," this Court should conduct a *de novo* review of the studies and surveys. The evidence is deficient to show that the attitudes of

laboratory subjects can predict the behavior of real juries. One fundamental problem with the methodology is that the subjects were not reliably identified as DQs or WEs before they were compared. In addition to this suspect classification, the comparison of subject groups is not equivalent to comparing death-qualified juries, since the latter are not composed solely of WEs.

Lastly, this research has been severely criticized by other experts in the field, establishing that there is no consensus within the social science community about either the proper methodology or the value of the research to guide courts on issues such as these.

ARGUMENT

I.

ARKANSAS' JURY SELECTION PROCEDURES ARE CONSTITUTIONAL BECAUSE THE STATE IS JUSTIFIED BOTH (1) IN EXCLUDING JURORS IN THE GUILT PHASE OF A CAPITAL MURDER TRIAL WHO WILL NOT FOLLOW THE LAW IN THE PENALTY PHASE AND (2) IN TRYING BOTH PHASES OF A CAPITAL CASE BEFORE THE SAME JURY.

In holding the State's jury selection procedures unconstitutional, the majority opinion of the Eighth Circuit Court of Appeals has failed to apply the proper constitutional analyses either to the State's procedures or to the State's interest in maintaining a unitary jury system. Two constitutional precepts were originally identified by the district court: (1) "the Sixth Amendment right to have a jury selected from a representative cross section of the community" and (2) "[the] Fourteenth Amendment due process right to have an impartial jury." (App. A7) The Eighth Circuit majority found it unnecessary to discuss the latter violation and instead created what the dissent dubbed a "curious merger" of the two precepts. (App. A42 n.2) Proper constitutional analysis under either constitutional precept requires consideration of the State's

interests in relationship to any infringement on a defendant's rights. Such consideration has never been properly afforded the State by either the district court or the Eighth Circuit.

In its original opinion remanding this case to the district court, the Eighth Circuit ignored the necessity of examining the State's interests by stating unequivocally that, if Grigsby made the requisite factual showing, he would have established that "his constitutional rights have been violated and he would be entitled to a new trial." *Grigsby v. Mabry*, 637 F.2d 525, 527 (8th Cir. 1980).

Among questions left open in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) is the relationship between the interests of the State and the defendant in both phases of a capital murder trial if a showing is made that a "death-qualified" jury is "less than neutral with respect to guilt." *Id.*, 391 U.S. at 520 n.18. While the State denies that McCree has made such a showing, this Court has recognized that proof of this issue is only the first step in the Sixth Amendment analysis. This Court recognized in *Witherspoon* that it then becomes necessary to weigh both parties' interests in an impartial jury.⁴

The Arkansas Supreme Court specifically took issue with the Eighth Circuit's perspective on this aspect of *Witherspoon*. Noting that this Court found "the evidence too tentative and fragmentary" to adopt a *per se* rule, *Witherspoon*, 391 U.S. at 517, the Arkansas court stated:

4

"If [a defendant] were to succeed in that effort, the question would then arise whether a State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence - given the possibility of accomodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment." *Witherspoon*, 391 U.S. at 520 n.18 (Emphasis added).

We do not take that disposition of the issue to carry an implication that the Court would necessarily have disapproved death-qualified juries if the proof had been complete.

Rector v. State, 280 Ark. 385, 388, 659 S.W.2d 168 (1983).
Cert. denied, 104 S.Ct. 2370 (1984).

In the Eighth Circuit's subsequent opinion, no analysis nor even mention is made of the State's interests as they affect any alleged constitutional violation itself. The only mention made of any state interest is of the cost and efficiency of trials, and that reference is only in the context of their effect on any procedural remedy which the State may adopt. (App. A38)

The district court did include a section on the "State's Justification of Challenged Practice" in its opinion, but its analysis was incorrect. (Supp. App. 102-125) The district court found that the "State's principal interest in preserving death qualification or the death qualification process boils down to a question of efficiency and money." (Supp. App. 120) In analyzing the district court's opinion in this regard, the Arkansas Supreme Court stated in *Rector*, 280 Ark. at 391:

The district judge's decidedly critical analysis of our cases would be disturbing if it were not so readily apparent that the analysis and criticism are totally and demonstrably wrong.

Based on an erroneous interpretation of Arkansas law, the district court stated that:

So we are not dealing here with ancient and traditionally accepted applications of venerable rules of state practices. To the contrary, we are here dealing with state rules developed judicially in recent years mostly in response to a United States Supreme Court decision (*Witherspoon*), which has dramatically changed

those rules from what they were for almost a century and a half.

(Supp. App. 118)

The Arkansas Supreme Court was "bewildered" by the district court's failure to note the reasons for changes occurring in Arkansas jury selection law which were fully explained in *Needham v. State*, 215 Ark. 935, 224 S.W.2d 785 (1949), which the district court quoted. *Rector*, 280 Ark. at 392, 659 S.W.2d at 171. As the district court's erroneous interpretation of Arkansas law permeates its opinion, the Arkansas Supreme Court properly rejected its holding and found the State's jury selection procedure constitutional for two reasons:

(1) [W]e can find no unconstitutional impartiality in the makeup of a death-qualified jury.

* * *

(2) It has always been the law in Arkansas, except when the punishment is mandatory, that the same jurors who have the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment.

Id. at 395, 659 S.W.2d at 173. The Arkansas Supreme Court found the cross-section analysis totally unnecessary under *Duren v. Missouri*, 439 U.S. 357 (1979), since the State's interests justified "the exclusions inherent in the death qualification process." *Rector*, 280 Ark. at 393, 659 S.W.2d at 172. In complete contrast to the district court, which analyzed both constitutional precepts and found that the State's interests in cost and efficiency did not justify the alleged infringements under either constitutional analysis, the Arkansas Supreme Court found no violation of the constitutional right to an impartial jury and that the State's interest in a unitary jury system justified any possible infringement of the cross-section requirement.

This Court has recognized that the states have *broad discretion* in fashioning their jury selection procedures. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). The Court concluded its *Taylor* opinion by stating:

Our holding does not augur or authorize the fashioning of detailed jury selection codes by federal courts. The fair cross-section principle must have *much leeway in application*. The states remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.

Id. (Emphasis added).

The goal of a fair cross-section is never to be achieved at the cost of leaving disqualified veniremen on a jury. *Smith v. Balkcom*, 660 F.2d 573, 582 (1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982), *quoting Taylor*, 419 U.S. at 537. Even the demonstration of a *prima facie* fair cross-section violation does not establish that a *constitutional violation* has occurred. *Duren*, 439 U.S. at 367 (emphasis added). A "significant state interest" which is "manifestly and primarily advanced" by its jury selection process constitutional even if there is some infringement of the cross-section requirement. *Id.* As will be developed in succeeding sections, McCree has failed to establish such an infringement, much less a violation of constitutional proportion.

The State has a significant interest in obtaining jurors who *can* "follow their instructions and obey their oaths" and who "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Wainwright v. Witt*, 105 S.Ct. 844, 850 (1985), *quoting Adams v. Texas*, 448 U.S. 38, 44-45 (1980) (emphasis added). Such jurors are not uniquely an interest of the state; the "impartial jury" guaranteed to a defendant consists of just such jurors. *Witt*, 105 S.Ct. at 852.

"Between [a defendant] and the state the scales are to be evenly held." *Swain v. Alabama*, 380 U.S. 202, 220 (1965), *quoting Hayes v. Missouri*, 120 U.S. 68, 70 (1887). The State does not necessarily seek to "vindicate" its interest in a penalty "at the expense of the defendant's interest in a completely fair determination of guilt or innocence." *Witherspoon*, 391 U.S. at 520 n. 18; rather the State seeks to keep the scales evenly held between itself and a defendant in both phases of a capital murder trial. The State seeks only that to which a defendant is also entitled: an "impartial jury" to determine both guilt or innocence and the appropriate penalty.

The State's interest in exercising its right to exclude "began with a recognition that certain . . . jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Witt*, 105 S.Ct. at 851. Difficulties presented both to the State and to the juror himself, if WEs are not excluded from guilty phase determinations, were recognized by the Fifth Circuit in *Spinkellink v. Wainwright*, 578 F.2d 582, 595-96 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) (emphasis added):

Although the juror could be excused from the jury during the sentencing phase of the trial, during the guilt-determination phase he still would know that a vote to convict could eventually mean the death penalty, a result to which he would have contributed, if on, indirectly. His choices as to how to vote on the defendant's guilt or innocence would remain equally troublesome.

See also Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984).

There is even support in McCree's evidence that such difficulties exist. (App. A.49, n.6)

Under the Arkansas unitary jury system, a juror who will not consider the death penalty as a possible punishment

cannot perform one of his essential duties as a juror. The Arkansas Supreme Court found the two questions of guilt or innocence and punishment to be "necessarily interwoven." *Rector*, 280 Ark. at 395, 659 S.W.2d at 173. The Arkansas court went on to comment about modifications suggested by the district court:

The difficulty with both those schemes for shuffling jurors in and out of the jury box, is the separation of certain jurors' responsibility for the verdict from their responsibility for fixing the penalty. The two must go hand in hand, else the common law jury system no longer exists.

Id. at 396.

The Eighth Circuit dissent found this State preference to be justified by "the most significant policy considerations" and also found that a division of juror responsibilities "would dilute accountability and disadvantage the accused." (App. A48)

The possibility of disadvantage to an accused was further developed by the dissent when it stated:

[A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or "whimsical" doubts, *Balkcom*, 578 F.2d at 496, about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases. To divide the responsibility, as the court's decision today would require, to some degree would eliminate the influence of such doubts.

(App. A48)

The unitary jury system has always been the law in Arkansas, *Rector*, 280 Ark. at 395, 659 S.W.2d at 173, and is

the same for capital and non-capital crimes.⁵ As applicable to capital murder, it is legislatively mandated and judicially endorsed. Ark. Stat. Ann. §41-1301(3) (Repl. 1977). *Rector*, *supra*. Questions applicable to punishment are routinely asked during voir dire in all criminal trials. Jurors who will not consider all the penalties provided by law may properly be excused for cause in non-capital cases. *Stephens v. State*, 277 Ark. 113, 640 S.W.2d 94 (1982). The Arkansas Supreme Court based its holding in *Stephens* on the State's right to an impartial jury and the state statute on actual bias.

This Court held in *Witt* that there is nothing "talismanic" about a Sixth Amendment analysis of a capital case. 105 S.Ct. at 852. The definition of an impartial jury does not change because a defendant is being tried for a capital crime, and biased jurors can properly be excused by the State. *Id.* It is also true that the State's power to exclude does "not extend beyond its interest in removing those particular jurors." *Id.* The Court found constitutional violations in *Witherspoon* and *Adams* when the State's exclusions had an overly broad basis. In the instant case, the State's exclusions were directly based on its interest in having jurors who could sit in both phases of the trial and who could follow the law.

In re-examining the proper standard for juror exclusions in *Witt*, this Court based its adoption of the *Adams* standard on three grounds: (1) that sentencing juries are no longer invested with the unlimited discretion found in *Witherspoon*; (2) that statements in the *Witherspoon* footnotes are dicta and the Court's actual holding in *Witherspoon* focused on when jurors could *not* be excluded, rather than when they *could* be; and (3) that the *Adams* standard is "in accord with the traditional reasons for

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A unitary jury system is also required in civil trials. Remands are not made solely for the determination of damages because the issues of liability and damages are inseparably linked. *Rector*, 280 Ark. at 395-396, 659 S.W.2d at 173.

excluding jurors and with the circumstances under which such determinations are made." 105 S.Ct at 851. These three grounds are also helpful in analyzing the State's justification for its exclusions in the instant case and its interest in maintaining a unitary jury system.

As recognized in *Witt*, Arkansas no longer allows unlimited discretion in imposing the death sentence. 105 S.Ct. at 851, n.4. The Arkansas legislature first adopted a constitutionally acceptable bifurcated procedure for capital cases in 1973. *Collins v. State*, 259 Ark. 8, 12-13, 531 S.W.2d 13, 15 (1975), *vacated in part*, 428 U.S. 153 (1976), *aff'd in part*, 261 Ark. 336, 548 S.W.2d 135, *cert. denied*, 434 U.S. 878 (1977). With the adoption of the present criminal code in 1976, Arkansas prosecutors face one of the highest standards defined in any state for the imposition of the death penalty. The death penalty is only available for capital murder, which is carefully defined. Ark. Stat. Ann. §41-1501(1)(a)-(g) (Repl. 1977). It is not available for first degree murder. Ark. Stat. Ann. §§41-1502 and 41-901 (Repl. 1977). A sentence of death may only be imposed if a unanimous jury finds that: (1) statutorily defined aggravating circumstances exist beyond a reasonable doubt; (2) aggravating circumstances outweigh all mitigating circumstances beyond a reasonable doubt; and (3) aggravating circumstances justify a sentence of death beyond a reasonable doubt. Ark. Stat. Ann. §41-1302 (Repl. 1977). The Eighth Circuit dissent recognized this high standard represented an "acute" risk which the State bore in capital cases. (App. A49).

The State is not trying to reduce the level of due process afforded a capital defendant as in *Ballew v. Georgia*, 435 U.S. 223 (1978). Capital defendants are already afforded more due process than non-capital defendants (bifurcated trial, opportunity to present mitigating evidence, sentencing guidelines). See, *Britton v. Rogers*, 631 F.2d 572 (8th Cir. 1980). The State seeks only to submit

the facts of a case to an impartial jury which can fairly decide both guilt or innocence and penalty.

In *Lockett v. Ohio*, 437 U.S. 586 (1978), four veniremen were excused for cause pursuant to *Witherspoon* in the guilt phase of a capital murder trial in which the trial court itself would make the ultimate sentencing decision. These exclusions were upheld by this Court because these jurors could not be trusted to follow the law. In considering a fair cross-section argument in that context, the Court stated:

Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge.

Lockett at 596-597. Relying on a faulty interpretation of *Witherspoon*, and discounting the impact of *Lockett* and *Witt*, the Eighth Circuit has now created a broad-based rule of mandatory inclusion in total derogation of the State's ability to excuse biased jurors. Factually, this rule is based strictly on social science evidence with no examination of the actual records of voir dire in the case. Legally, this rule is based on a faulty cross-section analysis which fails to account for functional differences between exclusion and inclusion. (App. A41).

The focus in *Witherspoon* was on when jurors could not be excluded. They cannot be excluded when they voice only general objections to the death penalty or express conscientious or religious scruples against its imposition. The Court held in *Adams* that jurors had been improperly excluded under a Texas statute when the "touchstone of the inquiry" was too broad. *Id.* at 49. As applied in that case, jurors could not be excluded where their responses were not directed at their ability to follow the law and abide by their oaths. *Id.* In the instant case, "Witherspoon excludables" are by their very definition, jurors who cannot follow the law applicable to a statutory and constitutional

penalty. In Arkansas where the jury plays a much more extensive role in the penalty stage than do juries in Texas,⁶ the absolute refusal of these jurors to follow the law is a proper basis for their exclusion under *Adams* and *Witt*.

The exclusion of a juror is a factual finding by a state trial judge regarding the juror's state of mind and is based on the trial court's observation of the juror's response, his demeanor and his credibility. *Witt*, 105 S.Ct. at 854. Such findings are entitled to a presumption of correctness, *Patton v. Yount*, 104 S.Ct. 2885 (1984). Proper bounds to the voir dire procedure itself also lie within the sound discretion of the trial court. *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). The district court's remedy in this case would have stripped the trial judges of their traditional role in that there would be no exclusions for cause and severe limitations on the voir dire procedures. (Supp. App. 94-95) The district court would also strip the jury of its traditional role by divorcing the question of guilt or innocence and penalty and requiring the use of two juries.

The Eighth Circuit did not endorse every recommendation of the district court. The Eighth Circuit specifically vacated the two-jury requirement and left the procedural remedy to the State's discretion. (App. A7) It also specifically declined to pass on the issue of the prejudicial nature of the voir dire procedure itself. (App. A38)⁷ By leaving these questions unanswered, the Eighth Circuit again failed to address the State's interest and its justification for its existing procedure.

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Pursuant to Ark. Stat. Ann. §41-1301 et seq., juries in Arkansas decide the actual penalty. Juries in Texas answer certain statutory questions, which in turn determine the sentence pronounced by the trial judge. *Adams*, 448 U.S. at 46 (1980).

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The district court proposed severe restrictions on the voir dire process itself based on the Haney study to which the State raised the procedural bar of *Wainwright v. Sykes*, 433 U.S. 72 (1972). (Supp. App. 75). The issue before the Court relates only to exclusions for cause resulting from the death qualification process.

Assuming that a cross-section analysis of the State's interests is necessary, the Court is again faced with the necessary balancing test identified by Justice Rehnquist in *Witt*, 105 S.Ct. at 852, n.5, i.e., balancing a defendant's right to a jury panel drawn from a fair cross-section of the community against the traditional right of the State to challenge a juror for bias. The extreme of a defendant's right to a fair cross-section was identified as requiring the inclusion of jurors who could not follow the law. The extreme of the State's right to exclude biased jurors was identified as the exclusion of jurors whose general philosophical views did not relate to their functions as jurors. The latter extreme is precluded by *Witherspoon* and *Adams*. The former extreme has been improperly mandated by the Eighth Circuit.

A proper constitutional analysis under the Sixth and Fourteenth Amendments recognizes that the state has an interest in excluding jurors who cannot follow the law and has broad discretion in fashioning its jury selection procedures. *Taylor*, 419 U.S. at 538. These interests are manifestly and primarily advanced by the exclusions inherent in the death qualification process. The Eighth Circuit has failed to examine the State's real and articulated interests to determine if they are justified. Instead of balancing interests and granting any leeway in applying the cross-section principle, the Eighth Circuit has created an overbroad rule of inclusion which is not constitutionally mandated. An examination and balancing of the State's interests under the Sixth and Fourteenth Amendments reveals that Arkansas capital jury selection procedures are constitutional.

II.

THE EIGHTH CIRCUIT'S LEGAL CONCLUSIONS
ARE BASED ON IMPROPER CONSTITUTIONAL
ANALYSES.

McCree alleged that his trial under current Arkansas statutes violated two constitutional rights—his Sixth and Fourteenth Amendment rights to a fair and impartial jury and his Sixth Amendment right to a jury drawn from a fair cross-section of the community. The Eighth Circuit, echoing the district court without repeating even its tenuous reasoning, held that in order for these rights to be afforded to McCree, the State must drastically alter its traditional and commonly accepted unitary jury system. The actual legal bases for the holding below are at best difficult to decipher. The State is entitled to know why, as a matter of law, its capital trial procedures were rejected as unconstitutional by the Eighth Circuit. This Court must find the answer to that question in order to adequately review this case. Perhaps the legal reasoning of the Eighth Circuit is unclear simply because there is no legal basis for its conclusions under any permissible construction of this Court's precedents. Even assuming that the factual findings are correct, which the State does not concede, the proof and existing law do not require the legal consequences mandated by the Eighth Circuit.

This Court has obviously recognized the significance of the issues presented here by granting certiorari. The State pointed out in its petition for review that the impact of this case goes beyond the trial of McCree and may ultimately reach thousands of inmates across the country. That is one reason the scope of this Court's review should be as broad as possible. There is ample authority for broad review of both the factual findings and the legal conclusions.

Turning to the factual findings, the lower courts began with data having nothing directly to do with McCree's trial. They then applied its factual findings about that evidence to death-qualified jurors in general. They went from there to impute those findings to the jurors who actually tried McCree. In doing so, they established the "constitutional fact" that *all* death-qualified jurors are conviction prone. That fact was then expanded to establish new and radical

constitutional law which, if left standing, will affect the capital trial procedures of numerous States. It cannot be too strongly emphasized that the factual findings made in this case are not "case-specific" findings of historical fact based on what actually occurred in McCree's trial. In fact, the lower courts relied on totally unrelated data, and, by quantum leaps in reasoning, created their own "facts" with regard to McCree's jury.

Review of findings of fact by the district court is generally governed by Fed.R.Civ. p. 52(a), requiring that the "clearly erroneous" standard be applied. This is true, although to a lesser extent, when the findings are based on physical or documentary evidence or inferences from other facts, rather than strictly on credibility of the witnesses. *Anderson v. Bessemer City*, 84 L.Ed.2d 518, 528 (1985). Actually, this Court could reverse the factual findings on the clearly erroneous standard, since it should certainly be left, after reviewing the entire evidence, "with the definite and firm conviction that a mistake has been committed." See, e.g., *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Where "constitutional facts" are at issue, however, this Court may perform a de novo review. See *Turner v. Arkansas*, 407 U.S. 366, 368 (1972) (per curiam); *Ashe v. Swenson*, 397 U.S. 436, 442-43 (1970); *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964).

There is yet another reason why the Court should carefully review the factual findings. This Court recently made it clear that a State court finding of the bias or impartiality of a juror is a finding of historical fact entitled to the presumption of correctness under 28 U.S.C. §2254(d). *Witt*, 105 S.Ct. at 854; *Patton v. Yount*, 104 S.Ct. 2885, 2891 (1984). The Court noted in *Patton*, *id.* at 2893, that it is the trial court judge "who is best situated to determine competency to serve impartially." *Witt* specifically applied this rule to the selection of jurors in capital trials, *id.* at 854, 855, and also made it clear that the trial court's

determination of bias (or impartiality) is presumed to have been made with the correct standard and need not be articulated in the record, *id.* at 855-56, citing *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). The presumption that the trial court properly excused the WEs and properly seated impartial jurors at McCree's trial was not even addressed by either court below. McCree's studies are far from the clear and convincing evidence required to show that the factual determination by the State court was erroneous. *Witt*, 105 S.Ct. at 858.

It requires no citation that if this Court finds errors of law, it may reverse.

A. THE EIGHTH CIRCUIT IMPROPERLY IMPUTED BIAS TO ALL DEATH-QUALIFIED JURORS.

Courts deciding the guilt-proneness issue have first wrestled with the abstract concept of "impartiality." An impartial juror is one who will "render a verdict based on the evidence presented in court," *Dobbert v. Florida*, 431 U.S. 282, 302 (1977), citing *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). Similarly, this Court has defined an impartial jury as one composed of jurors "who will conscientiously apply the law and find the facts." *Witt*, 105 S.Ct. at 852.

It is clear that both the district court and the Eighth Circuit perceived that this case presented an issue of the impartiality of *juries*, as opposed to *jurors*. (Supp. App. 62, 71; App. A35 n.31). If that is accepted as the analysis actually applied, such findings involve mixed questions of fact and law. *Patton*, 104 S.Ct. at 2889 & n.7, 2891, citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Regardless, it is almost impossible to separate the findings of fact and conclusions of law in the *McCree* opinions.

In analyzing the impartiality issue, the district court relied first on the early and simpler due process cases, like *Tumey v. Ohio*, 273 U.S. 510 (1927). (Supp. App. 36-37) It then quoted from one pretrial publicity case, *Sheppard v. Maxwell*, 384 U.S. 333 (1966). (Supp. App. 37) It then relied heavily on fragments from *Witherspoon*. (Supp. App. 39-42, 132) By circular reasoning and by reference to the cross-section analysis under *Duren* and *Taylor*, which requires "no need to show particularized bias," (Supp. App. 103, 132) it concluded its analysis of the impartiality issue. This is the full extent of the district court's legal analysis of the impartiality issue.

The Eighth Circuit indicated that its analysis of this issue rested solely on Fourteenth Amendment due process grounds. (App. A6-A7) However, it immediately stated that its finding of a cross-section violation rested on its finding that a death-qualified jury is "in fact conviction-prone." It then stated that this Sixth Amendment violation made it unnecessary "to discuss the issue whether the jury in the petitioner's case was in fact a biased jury." (App. A7) The "fundamental issue" was whether the evidence supported a finding that a death-qualified jury is conviction-prone, and if so, *ipso facto*, McCree had established a Sixth Amendment violation. (App. A15) In other words, the Eighth Circuit totally failed to analyze the impartiality issue, but jumped instead from the evidence to the cross-section issue.

A clear analysis of the relationship between guilt-proneness and impartiality is difficult. This case presents a unique method of attempting to prove bias, and partially because of the Eighth Circuit's denial that proof of bias was required, it does not fit neatly into any of the traditional analyses. As stated by the dissent:

The court's first error in this analysis lies in assuming that partiality as a *legal* concept is proven when *factually* it can be shown that juries with WEs removed are more conviction-prone. Even if we assume

that the latter proposition is correct, the court still fails "to bridge the gap of proof between the abstract proposition that death-qualified jurors are conviction prone and the contention that the jury which convicted him was in fact less than neutral with respect to guilt." *Balkcom*, 660 F.2d at 580 n.17.

(App. A50; footnote omitted).

Neither the Eighth Circuit, nor the district court squarely addressed the issue of whether McCree's jury was impartial.

The district court envisioned that its resolution of this issue would provide a jury with a balance of biases. (Supp. App. 85). That is not, however, a proper definition of "impartial." While this Court used that language in *Ballew*, *supra*, the *Ballew* reasoning applies only to jury size and the opportunity for a balancing of biases. See *Balkcom*, 660 F.2d at 583-84. *Ballew* could not possibly mandate a balancing of actual biases or attitudes. As stated by the Eighth Circuit dissent, a goal of balancing biases "strips of significance the sworn oath of impartiality that each juror takes." (App. A52)

The lower courts apparently considered death-qualification akin to prejudicial pretrial publicity, but their analysis and remedy are quite the opposite from those applied in publicity cases. Instead of relying on demonstrable prejudice found in the voir dire record, they impute bias only from pseudoscientific studies and surveys, none of which has any relevance to any Arkansas jurors, much less to any of the jurors who tried McCree; and instead of relying on the trial court to protect a defendant's right to an impartial jury, see *Witt*, 105 S.Ct. at 855, they mandate a per se rule (and establish a constitutional fact) that death-qualification is unconstitutional.

Publicity cases involving a pre-voir dire presumption of prejudice are instructive. It is significant that in several cases involving that issue, public opinion surveys (similar to some of McCree's evidence) have been submitted and rejected as a basis of determining whether a fair and impartial jury could be selected. In *United States v. Haldeman*, 559 F.2d 31, 64 n.43 (D.C. Cir. 1976), cert. denied, 413 U.S. 933 (1977), the court stated:

It is our judgment that in determining whether a fair and impartial jury could be empanelled the trial court did not err in relying less heavily on a poll taken in private by private pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel pursuant to procedures, practices and principles developed by the common law since the reign of Henry II.

The court in *Haldeman*, *Id.* at 60, relying on *Irvin v. Dowd*, *supra*, held that the defendant had the burden of establishing prejudice occurring during jury selection; that such prejudice had to be a demonstrable reality, not speculation; and that such demonstration can only be made by reference to the voir dire.⁸ Other jurisdictions have also held that survey evidence was insufficient to establish prejudicial pretrial publicity.⁹

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If review is to be done as in pretrial publicity cases, the standard is whether "manifest error" was committed by the trial court; however, this Court recognizes very little distinction between this standard and applying the presumption of correctness under 28 U.S.C. §2254(d). *Patton*, 104 S.Ct. 2889 & n. 7.

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United States v. Engle, 586 F.2d 1193 (8th Cir. 1978); *United States v. Long Elk*, 565 F.2d 1032 (8th Cir. 1977); *United States v. Mandel*, 431 F.Supp. 90 (D. Md. 1977); *State v. Truesdale*, 296 S.E.2d 528 (S.C. 1982); *State v. Coleates*, 53 A.D.2d 1018, 386 N.Y.S.2d 525 (1976).

The standard for determining whether pretrial publicity has prejudiced an empaneled jury was well stated by Justice Clark in *Irvin*, 366 U.S. at 723.

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.

The lower courts have erected just such an "impossible standard." If a "preconceived notion as to guilt . . . without more," is insufficient to rebut the presumption of a prospective juror's impartiality, how is "guilt-proneness," without more, any different? This question was answered by the Arkansas Supreme Court in *Rector v. State*, 280 Ark. 385, 393, 659 S.W.2d 168, 172 (1983), in which the court rejected the district court's holding and stated, "[W]e cannot regard conviction-proneness either as inherently wrong or as destructive of the juror's impartiality." The court in *Rector* found no implication in *Witherspoon* that a constitutional violation would be established even if it were proved that death-qualified juries are guilt-prone. *Id.*, 280 Ark. at 388, 659 S.W.2d at 169.^{9b}

McCree made no showing of the partiality of his individual jurors. In fact, he rejected the idea that evidence of specific trials was even relevant. (T. 1002, 1208) He made

^{9b}

Other jurisdictions that have rejected the guilt-proneness argument are: *Bumper v. North Carolina*, 39 U.S. 543, 545 & n.6 (1968);

Witherspoon v. Illinois, 391 U.S. 510, 517 & n.10, 518 (1968); *McCleskey v. Kemp*, 753 F.2d 877, 901 (11th Cir. 1985), *Petition for cert. filed*, ____ U.S.L.W. ____ (U.S. May 28, 1985) (No. 84-6811); *Mattheson v. King*, 751 F.2d 1432, 1442 (5th Cir. 1985); *Keeten v. Garrison*, 742 F.2d 129, 134 (4th Cir. 1984), *petition for cert. filed*, ____ U.S.L.W. ____ (U.S. Feb. 2, 1985) (No. 84-6187); *Corn v. Zant*, 708 F.2d 549, 565 (11th Cir. 1983); *Smith v. Balkcom*, 660 F.2d 573, (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 594 (5th Cir. 1978), *cert. denied*, 440 U.S. 796 (1979); *United States ex rel. Clark v. Fike*, 538 F.2d 750, 761 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); *United States ex rel. Townsend v. Twomey*, 452 F.2d 350, 362-63 (7th Cir. 1972), *cert. denied*, 4409 U.S. 854 (1972); *United States v. Marshall*, 471 F.2d 1051 (D.C. Cir. 1972); *Pope v. United States*, 372 F.2d 710, 724 (8th Cir. 1967); *Barfield v. Harris*, 540 F.Supp. 451, 463-64 (E.D.N.C. 1982); *Mitchell v. Hopper*, 538 F.Supp. 77, 93-94 (S.D. Ga. 1982); *Craig v. Wyse*, 373 F.Supp. 1008, 1010-11 (D. Col. 1974); *Clark v. State*, 451 So.2d 368 (Ala. Cr. App. 1984); *State v. Ramirez*, 116 Ariz. 259, 569 P.2d 201 (1977); *Hendrickson v. State*, 285 Ark. 462, 688 S.W.2d 295 (1985); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), *cert. denied*, 104 S.Ct. 2370; *Coble v. State*, 274 Ark. 134, 140, 624 S.W.2d 421 (1981), *cert. denied*, 456 U.S. 1008 (1982); *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 1307-1346, 168 Cal. Rptr. 128 (1980); *State v. Blount*, 472 A.2d 1340 (Del. Super. 1984); *Dougan v. State*, 470 So.2d 697 (Fla. 1985); *Nettles v. State*, 409 So.2d 85, 86 (Fla. App. 1982); *Harrell v. State*, 249 Ga. 48, 288 S.E.2d 192, 195 (1982); *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977); *People v. Collins*, 478 N.E.2d 267 (Ill. 1985); *People v. Holman*, 469 N.E.2d 119 (Ill. 1984); *People v. Cabellero*, 464 N.E.2d 223 (Ill. 1984); *Fielden v. State*, 437 N.E.2d 986, 992 (Ind. 1982); *State v. Campbell*, 210 Kan. 265, 500 P.2d 21, 27 (1972); *State v. Butler*, 462 So.2d 1280 (La. App. 5th Cir. 1985); *Poole v. State*, 295 Md. 167, 453 A.2d 1218, 1229 (1983); *Chadderton v. State*, 54 Md. App. 86, 456 A.2d 1313, 1315 (1983); *Commonwealth v. McAlister*, 365 Mass. 454, 313 N.E.2d 113, 115 (1974), *cert. denied*, 419 U.S. 1115 (1975); *State v. Nave*, 694 S.W.2d 729 (Mo. 1985); *State v. Guinan*, 665 S.W.2d 325 (Mo. 1984); *State v. Davis*, 653 S.W.2d 167 (Mo. 1983); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462, 470 (1983); *State v. Bass*, 189 N.J. Super. 461, 460 A.2d 223 (1983); *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850, 854 (1975); *State v. Bare*, 305 S.E.2d 513 (N.C. 1983); *Nichols v. State*, 690 P.2d 463 (Okla. Crim. App. 1984); *Hager v. State*, 665 P.2d 319 (Okla. Crim. App. 1983); *Hogue v. State*, 652 P.2d 300 (Okla. Crim. App. 1982); *Commonwealth v. Morales*, 494 A.2d 367 (Pa. 1985); *Commonwealth v. Szuchon*, 484 A.2d 1365 (Pa. 1984); *Commonwealth v. Story*, 440 A.2d 488 (1981); *State v. Strouth*, 620 S.W.2d 467 (Tenn. Sup. Ct. 1981), *cert. denied*, 455 U.S. 983 (1982); *Poyner v. Commonwealth*, 329 S.E.2d 815 (Va. 1985); *Justus v. Commonwealth*, 222 Va. 667, 675, 283 S.E.2d 905, 909 (1981); *State v. Bartholomew*, 98 Wash. 2d 173, 654 P.2d 1170 (1982); *State v. Peyton*, 29 Wash. App. 701, 630 P.2d 1362 (1981).

no showing of the partiality of his jury as a whole.¹⁰ He had little evidence exclusively applicable even to Arkansas juries. It is only from his psuedo-scientific studies and surveys that the district court could find any "evidence" of bias. The district court based its holding on little more than a finding that death-qualified jurors have "unconscious predilection[s]" which tend to favor the State. (Supp. App. 27, citing *Adams*)

While the Eighth Circuit denies that any proof of bias (even of death-qualified jurors in general) is necessary, that overlooks the very starting point of the district court's analysis. The lower courts could not get to the cross-section issue until they defined a cognizable group. The district court defined that group based on its attitudes (Supp. App. 13)—finding that death-qualified jurors are conviction-prone and therefore impermissibly biased. (Supp. App. 49, 126, 129, 131, 132) In short, it took that finding of bias to reach the threshold of the cross-section issue. To do so, the district court imputed bias not only to McCree's jurors, but to 81 to 88 percent of all jurors who have been selected after a *Witherspoon* voir dire.¹¹

It is true that a Sixth Amendment cross-section violation presumes a lack of impartiality, as that term is used in a Sixth Amendment context. It does not, however, presume bias. This Court has rejected the imputation of bias to jurors as a group in several lines of cases. In early cases, it refused to allow the imposition of bias based upon

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Any attempt to determine bias from the record of McCree's trial will be futile. The transcript of voir dire is incomplete. The State made no attempt to supplement the transcript, since the burden is on McCree to prove a prima facie cross-section violation in the selection of his own jury. *Duren*, 439 U.S. at 368.

¹¹

The court found that 11 to 17 percent of prospective capital jurors would be excluded for cause as WEs and that 1 to 2 percent would be excluded as ADPs. (Supp. App. 29, 83)

attitudes attributed to jurors because of their status as Government employees. *Dennis v. United States*, 339 U.S. 162 (1949); *United States v. Wood*, 299 U.S. 123 (1936). Calling bias "an exclusive condition of the mind," the Court in *Wood* rejected the use of "extreme and fanciful tests" to determine its existence, preferring instead to rely on traditional methods of full inquiry to determine the actual bias of an individual juror. *Id.* at 150.

The preference for full inquiry and the determination of the actual bias of individual jurors is also apparent in the case of *Rosales-Lopez v. United States*, 451 U.S. 182 (1981). The Supreme Court rejected the adoption of a per se rule requiring reversal when a trial judge failed to question jurors on racial prejudice at the request of a minority group defendant. "There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Id.* at 190. Error may only be based upon substantial indications of prejudice affecting individual jurors in a particular case. *Id.*

In a more recent case, this Court rejected the imputation of bias to an individual juror who had been placed in a seemingly compromising situation. *Smith v. Phillips*, 455 U.S. 209 (1982). The defendant's remedy was an opportunity to prove actual bias. McCree was afforded that opportunity, and he failed in his proof. His studies show at most a mere possibility of bias among WEs as a group, and he has neither established a nexus between that possibility and his venire nor any actual bias among his individual jurors.

It is also significant to any legal analysis that the Eighth Circuit opinion is grounded in the district court's strict adherence to a distinction between the two *Witherspoon* questions—the first going to bias in the penalty phase and the second to bias in the guilt phase. *Id.*, 391 U.S. at 522 n.21. The ultimate conclusions were based on a finding that nullifiers could be removed from the guilt

phase, based on their answers to the second question, but WEs could not, since they are only excluded for their answer to the first question. (App. A14 & n.11; Supp. App. 25, 35, 40, 43-44, 85, 94-95, 100-101, 119)

That entire premise was rendered erroneous in *Witt*, when this Court rejected the lower court's "ritualistic adherence" to the precise language of the *Witherspoon* questions, *id.* at 850, and specifically adopted the broader exclusion standard, *id.* at 852. The distinction between the *Witherspoon* questions is no longer of legal significance since the Court held: "The tests with respect to sentencing and guilt, originally in two prongs, have been merged," *Id.* at 851. In simplifying the standard the Court implicitly eliminated the distinction between nullifiers and WEs and made it "unmistakably clear" that the State can exclude from both phases any prospective juror whose views about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 850, (emphasis in original), quoting *Adams*, 448 U.S. at 45.

In short, the critical distinction made by the district court and relied upon by the Eighth Circuit no longer exists as a matter of law. WEs stand in the same stead as nullifiers, since there is no legal distinction between the ability to perform one's duties as a juror in the guilt phase and the ability to do so in the penalty phase.

B. THE EIGHTH CIRCUIT ERRED AS A MATTER OF FACT AND LAW IN FINDING A SIXTH AMENDMENT CROSS-SECTION VIOLATION.

By unusual and circuitous reasoning, the Eighth Circuit held that a "death-qualified" jury does not comprise a fair cross-section of the community because it is conviction-prone. The court found WEs to be a cognizable group under *Duren v. Missouri*, 439 U.S. 357 (1979), and held

that their systematic exclusion from a petit jury violates the Sixth Amendment's cross-section requirement.¹² These findings are all in conflict with the applicable precedents of this Court.

In order to establish a *prima facie* cross-section violation, McCree had to show

- (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation

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This Court has never addressed on its merits the allegation that excluding WEs from the *guilt* phase of a capital murder trial violates the Sixth Amendment. The Eighth Circuit held, however, that "*Witherspoon* itself is direct authority that a distinctive group eliminated for cause from the petit jury, violates the Sixth Amendment principle that requires a cross-sectional jury." (App. A11-A12) This is a curious conclusion for several reasons. First, the Eighth Circuit's misconstruction of *Witherspoon* is particularly interesting since the district court "hesitantly" concluded in its first opinion that it was *bound* by *Witherspoon* and, therefore, had to find that the exclusion for cause of WEs in the guilt phase was *not* a cross-section violation. *Grigsby v. Mabry*, 483 F.Supp. 1372, 1384-85 (E.D. Ark.), *aff'd. in part, vacated in part, remanded*, 637 F.2d 525 (8th Cir. 1980). Second, although *Witherspoon* was decided on both Sixth and Fourteenth Amendment grounds, 391 U.S. at 518, 523; *see also Witt*, 105 S.Ct. at 852, the court specifically rejected the cross-section argument, *Witherspoon*, 391 U.S. at 517-18, and decided the case on impartiality and due process grounds. *Id.* at 518, 523. Finally, it stretches *Witherspoon* beyond logic to suggest that this Court found the broad group excluded from jury service in that case to be cognizable for purposes of cross-section analysis. Indeed, if it had, it would have been required to find a cross-section violation and to vacate the conviction, as well as the sentence, *see Taylor v. Louisiana*, 419 U.S. 522 (1975). Vacating the conviction was something this Court specifically refused to do. *Witherspoon*, 391 U.S. at 518, 522-23 n.21. Further, since this Court recently described the cross-section concept as "barely adumbrated" in *Witherspoon*, *Witt*, 105 S.Ct. at 852 n.5, *Witherspoon* could hardly be "direct authority" on any cross-section issue. Lastly, as the dissent points out, the cross-section requirement had not even been applied to the States at the time *Witherspoon* was tried. (App. A42; *see also Supp. App.* 16)

to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364.

Review of the lower court's cross-section analysis is initially difficult because it involves an unprecedented expansion of two sub-issues, reflected in sub-parts (1) and (2) of the *Duren* analysis above. The district court acknowledged that it plowed new ground by creating a new definition of cognizability (finding a distinct group to be cognizable even though it is heterogeneous and is identified only by one particular "attitudinal perspective") and a new method of exclusion (finding that, even though the jury panel or venire is constitutionally representative, exclusion from petit jury through the voir dire process is impermissible). (See Supp. App. 23, 21) While the Eighth Circuit gave some analysis to the petit jury issue, (App. A9-A12), it summarily accepted the finding that WEs are a cognizable group. (App. A12-A13)

1. "DEATH-QUALIFIED" JURORS ARE NOT A DISTINCTIVE GROUP FOR CROSS-SECTION PURPOSES.

Cognizability for purposes of cross-section analysis has been strictly limited. In early cases, based on equal protection violations, it was limited to racial and ethnic exclusions.¹³ In *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946), the Court suggested that federal jury selection procedures may not systematically exclude economic, social, religious, racial, political and geographical groups. It was later established that exclusions may not be made on the basis of sex. *Duren*, *supra*; *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Ballard v. United States*, 329 U.S. 187 (1946). As

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Alexander v. Louisiana, 405 U.S. 625 (1972); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Strauder v. West Virginia*, 100 U.S. 303 (1888).

the district court noted, cross-section analysis does not require that, to qualify as a "substantial, distinctive and identifiable class," a group must "necessarily hold a 'distinctive attitude' unrepresented by others on the jury." (Supp. App. 12) This is particularly significant, because the district court found WEs to be a cognizable group based *solely* on their attitudes, a characteristic that is generally not even required to define cognizability.

In justifying its findings, the district court stated that it "must deal with 'distinctive attitudes' and 'decisional outlook' because such criteria are needed to define the group at issues." (Supp. App. 13; *emphasis added*) While that candor may be commendable, it reveals that the analysis started with a determination to find cognizability, despite no precedent for the justification. Cross-section analysis has always begun with a group that had some internal cohesion or common characteristic *other than* attitudes. When the group is readily identifiable by some objective classification, the courts *then* examine the attitudes of the group to determine if an "identifiable" group is necessarily "cognizable." See *Ballard*, *supra*, at 193-194.

Though "[a] precise definition of what constitutes a cognizable group is lacking," *United States v. Potter*, 552 F.2d 901, 903 (9th Cir. 1977), the federal courts are in general agreement about the characteristics of a cognizable group. In *Potter*, the Ninth Circuit held that cognizability requires "an identifiable group which, in some objectively discernible and significant way, is distinct from the rest of society, and whose interests cannot be adequately represented by other members of the . . . panel." The Ninth Circuit also required "the presence of some internal cohesion." Other factors are "whether a particular class is in fact thought of as an identifiable group by the larger community," and whether there exists "prejudice or community discrimination against the group." *Id.* at 904-05;

see also *United States v. Test*, 550 F.2d 577, 591 (10th Cir. 1976).

In *United States v. Gibson*, 480 F.Supp. 339 (S.D. Ohio 1979), members of labor unions were alleged to be a cognizable group. That court required that a cognizable group have a "common interest," and held that a finding of cognizability "rests both on the size of the putative group and on the unique nature of the prejudice which affects it." The union group was not cognizable because it was too "heterogeneous and fluid," possessing "divergent attitudes and characteristics which defy classification." *Id.* at 343 n.7. Similarly, in *Cobbs v. Robinson*, 528 F.2d 1331, 1336 (2d Cir. 1975), it was alleged that several ambiguously defined groups were excluded from grand jury service. Those groups lacked a fixed composition or thread which bound them into a cohesive group. A group is simply not cognizable if it is "diverse . . . [and] lacking in distinctive characteristics or attitudes which set [its members] apart from the rest of society." If members are "of varying economic backgrounds, and races, and of many different ages" their interests "can be adequately protected by the remainder of the populace." *Potter*, 552 F.2d at 905. The Eighth Circuit has reversed this reasoning. It found an otherwise "heterogeneous and fluid" group to be cognizable simply because of one "attitudinal perspective."

Those alleged to be disproportionately excluded by *Witherspoon* include "blacks, women, those with less than a high school education, and people with certain religious beliefs, especially Jews and agnostics."¹⁴ It is ludicrous to conclude that those diverse groups possess any cohesion or identifiable characteristics which are objectively discernible and significant.

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White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 Cornell L. Rev. 1176, 1193-1194 (1973), Ex. EB-31/CH-16.

Thus, based on traditional analyses, WEs are neither distinctive nor cognizable because they are not identifiable by any means other than their attitudes toward the death penalty as revealed during voir dire. In fact, a review of one death-qualification voir dire reveals that they are not easily identifiable on that basis. See *Witt*, 105 S.Ct. at 852. It should also be noted that this allegedly distinctive attitude is exactly what justifies their exclusion; they maintain a conscious, articulated and rigidly held refusal to follow the law and the instructions of the court, see *Lockett*, 438 U.S. at 596-97, and their "views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." *Witt*, 105 S.Ct. at 852 n.5.

Thus, while attitudes may be a factor in determining distinctiveness and cognizability, this Court has never held that attitudes alone are sufficient to define such a group. Moreover, attitudes, unlike the characteristics that underlie recognized cross-sectional groups, are subject to change. It has been firmly established that the number of WEs in the population is uncertain and dwindling. The *Harris* 1971 poll apparently reflects that approximately 23 per cent of the population at that time would have automatically voted against the death penalty. (Ex. EB-32/CH-17 at 11). The district court found, based on evidence adduced in 1981, that WEs comprise 11 to 17 percent of the jury-eligible population. (Supp. App. 29) Two prosecutors stated that the number of WEs actually found on jury panels was definitely declining. (Piazza, T. 1, 654, Burnett, (R. 111) Dr. Gerald Shure testified that the classifications can shift during a series of questions (T. 980-982; 985; 987; 1008) and that some jurors may change their attitudes during the course of a trial. (T. 983-984) (See App. A44 n.4) (Gibson, J., dissenting)

These facts indicate that WEs are not a fixed class and that the very characteristic by which they are identified is subject to change. (See App. A44-45) The classification of WEs as a group on the basis of attitudes is vastly different

from such classification characteristics as sex, race, and ethnic origin.

The representative cross-section issue was raised and summarily rejected in *Witherspoon*, 391 U.S. at 516-18. However, the Court reached a cross-section issue on its merits in *Lockett*, 438 U.S. at 596-97 (citations omitted), holding:

Nor was there any violation of the principles of *Taylor*. . . In *Taylor*, the Court invalidated a jury selection system that operated to exclude a "grossly disproportionate" . . . number of women from jury service thereby depriving the petitioner of a jury chosen from a "fair cross-section" of the community Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge.

Lockett dealt with "nullifiers," those veniremen who admit that they cannot be fair and impartial in the guilt phase, *Id.* at 595-97. However, the Court clearly held in *Witherspoon* that the States may exclude both those who would not be fair and impartial in the guilt phase (nullifiers) and those who would automatically vote against the imposition of capital punishment regardless of the evidence (WEs). *Id.*, 391 U.S. at 522 n. 21. See also *Lockett*, 438 U.S. at 596.

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court *sub silentio* expanded *Lockett* to adhere to its holding in *Witherspoon* that WEs can be excluded from the guilt, as well as the penalty, phase of a capital trial, if the State statutory scheme requires that one jury sit in both phases. Although the Court recognized the jury's "more limited [advisory] role" in Texas in assessing punishment, its discussion made it implicitly clear that it recognized that the same jury sat in both phases and that voir dire was conducted before the guilt phase. The Court explicitly

reiterated its holding in *Witherspoon* that the State could remove WEs to prevent the likelihood that they would "frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme." *Adams*, 448 U.S. at 51; See also *Witt*, 105 S.Ct. at 851.¹⁵

This Court has also upheld as constitutional Georgia's statutory scheme providing that the same jury must sit in both phases of a bifurcated capital murder trial. *Gregg v. Georgia*, 428 U.S. 153, 158, 160, 163 (1976).

In short, this Court has, since 1968, consistently held that the States may remove WEs from their capital murder juries. It explicitly rejected in *Lockett* the argument that *Taylor* cast any different light on the cross section holding in *Witherspoon*. Moreover, the *McCree* cross-section argument has been rejected in almost every jurisdiction,

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It is unnecessary for the State to contend that WEs are unable to sit fairly in the guilt phase. Their avowed inability to fairly assess punishment, coupled with the fact that Arkansas utilizes a unitary jury system, requires that they be removed at the guilt phase.

state or federal, which has ever considered it¹⁶—the exceptions being this case and the district court in *Keeten v. Garrison*, 578 F.Supp. 1164 (W.D.N.C.), *rev'd*, 742 F.2d 129 (4th Cir. 1984).

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McClesky v. Kemp, 753 F.2d 877, 901 (11th Cir. 1985), *Petition for cert. filed*, ____ U.S.L.W. ____ (U.S. May 28, 1985) (No. 84-6811); *Mattheson v. King*, 751 F.2d 1432, 1442 (5th Cir. 1985); *Keeten v. Garrison*, 742 F.2d 129, 133-34 (4th Cir. 1984), *petition for cert. filed*, ____ U.S.L.W. ____ (U.S. Feb. 2, 1985) (No. 84-6187); *Smith v. Balkcom*, 660 F.2d 573, 582-83 (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 596-98 (5th Cir. 1978), *cert. denied*, 440 U.S. 796 (1979); *United States ex rel. Clark v. Fike*, 538 F.2d 750, 761-62 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); *United States ex rel. Townsend v. Twomey*, 452 F.2d 350, 362-63 (7th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972); *Sinclair v. Turner*, 447 F.2d 1158, 1166-67 (10th Cir. 1971); *Turberville v. United States*, 303 F.2d 411, 418-21 (D.C. Cir. 1962); *United States v. Puff*, 211 F.2d 171, 182-86 (2d Cir. 1954), *cert. denied*, 347 U.S. 963 (1954); *McCorquodale v. Balkcom*, 525 F. Supp. 408 (N.D. Ga. 1981), *sentence vacated on other grounds*, 705 F.2d 1553 (11th Cir. 1983); *Martin v. Blackburn*, 521 F.Supp. 685 (E.D. La. 1981); *State v. Ramirez*, 116 Ariz. 259, 569 P.2d 201 (1977); *Hendrickson v. State*, 285 Ark. 462, 465-66, 688 S.W.2d 295 (1985); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), *cert. denied*, 104 S.Ct. 2370 (1984); *People v. Fields*, 35 Cal.3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983); *Dougan v. State*, 470 So.2d 697 (Fla. 1985); *Nettles v. State*, 409 So.2d 85, 86 (Fla. App. 1982); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983); *Harrell v. State*, 249 Ga. 48, 288 S.E.2d 192, 195 (1982); *People v. Smith*, 469 N.E.2d 634 (Ill. App. 1 Dist. 1984); *People v. Holman*, 469 N.E.2d 119 (Ill. 1984); *People v. Free*, 447 N.E.2d 218 (Ill. 1983); *People v. Robinson*, 432 N.E.2d 1195, 1198 (Ill. App. 1982); *Fielden v. State*, 437 N.E.2d 986, 992 (Ind. 1982); *State v. Butler*, 462 So.2d 1280 (La. App. 5th Cir. 1985); *State v. Perry*, 420 So.2d 139, 143 (La. 1982), *cert. denied*, 103 S.Ct. 2438 (1983); *Chadderton v. State*, 54 Md. App. 86, 456 A.2d 1313, 1315 (1983); *State v. Nave*, 694 S.W.2d 729, 735-36 (Mo. 1985); *State v. Preston*, 673 S.W.2d 1 (Mo. 1984); *State v. Follins*, 672 S.W.2d 167 (Mo. App. 1984); *State v. Bass*, 189 N.J. Super. 461, 460 A.2d 223 (1983); *State v. Peacock*, 330 S.E.2d 190 (N.C. 1985); *State v. Bare*, 305 S.E.2d 513 (N.C. 1983), *relying on State v. Williams*, 292 S.E.2d 243 (N.C. 1982), *cert. denied*, 103 S.Ct. 474 (1982); *State v. Taylor*, 283 S.E.2d 761 (1981); *State v. Pinch*, 292 S.E.2d 203, 213, *cert. denied*, 103 S.Ct. 474 (1982); *Commonwealth v. Morales*, 494 A.2d 367 (Pa. 1985); *Commonwealth v. Story*, 440 A.2d 488, 495 (1981); *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981), *cert. denied*, 102 S.Ct. 3510 (1982); *Boggs v. Commonwealth*, 331 S.E.2d 407 (Va. 1985); *Poyner v. Commonwealth*, 329 S.E.2d 815 (Va. 1985).

The Eighth Circuit cursorily applied the three-part *Duren* test and concluded that McCree had made a prima facie showing of a cross-section violation. (App. A12-A14) In contravention of *Duren*, however, the Eighth Circuit ended its analysis there. *Duren* requires that the prima facie showing be balanced against any significant state interest in the exclusions. *Id.*, 439 U.S. at 367-68. While the district court gave grudging lip service to what it identified as the State's interests—efficiency and money, (Supp. App. 118-125) the Eighth Circuit apparently did not see fit to complete the *Duren* analysis. The State's interests in preserving its unitary jury system significantly outweigh any cross-section violation, even if one were properly found to exist, as is argued above in Point I. It may be very significant that, in its eagerness to affirm the district court, the Eighth Circuit neglected even to consider the State's interests and the balancing required by *Duren*.

2. THE CROSS-SECTION REQUIREMENT SHOULD NOT BE APPLIED TO PETIT JURIES ON THESE FACTS.

The Eighth Circuit also erred in its unprecedented extension of the cross-section requirement to hold that it applies to a petit jury. In *Duren*, it was noted that the representativeness requirement applies to "jury wheels, pools of names, panels, or venires from which juries are drawn." *Id.*, 439 U.S. at 363-64. Similarly, in *Taylor*, 419 U.S. at 538, the Court stated, "[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect various distinctive groups in the population." The holding in *Taylor* applied only to "jury wheels, pools of names, panels or venires." *Id.* at 538. Even the Eighth Circuit, in a prior holding on this issue, found that "[t]he point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn." *Pope v. United States*, 372 F.2d 710, 724-25 (8th Cir. 1967), *vacated on other grounds*, 392 U.S. 651 (1968), *quoting Turberville v. United States*, 303 F.2d 411, 419, *cert. denied*, 370 U.S. 946 (1962).

Further, in *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972), this Court rejected the concept that "every distinct voice in the community has a right to be represented on every jury" and held that "no defendant has the right to seat biased jurors whom he feels might be more sympathetic to his case." And, although this Court has applied the cross-section requirement to a petit jury, *Ballew v. Georgia*, 435 U.S. 223 (1978), that case dealt only with the number of jurors required, not with any arguably excluded group.

Thus, while there may be some future case in which the cross-section requirement may be applied to exclusions from a petit jury (*see* App. A11), this is not such a case.

The underpinnings of McCree's entire premise are simply too shaky to justify such an expansion of the traditional cross-section analysis. The Eighth Circuit's cursory and faulty analysis of the impartiality issue completely ignored why WEs are excluded from capital petit juries. At the risk of redundancy, it is not because of their attitudes toward the death penalty, but because of their avowed refusal to follow the law. By following *Witherspoon* and *Adams*, the State does not arbitrarily exclude a traditionally identified and protected group from jury service. It merely enables its commonly accepted capital trial procedure to function as intended—to allow both a capital defendant and the State a trial by a single jury, selected for its ability to follow reliably all of the law and instructions relevant to the issues presented.

In short, the exclusion of veniremen from the petit jury solely because of their refusal to follow the law could not possibly mandate the unprecedented extension of *Duren* and *Taylor* required by the Eighth Circuit.

III.

THE EIGHTH CIRCUIT'S FACTUAL FINDINGS
ARE BASED ON INHERENTLY UNRELIABLE
CIRCUMSTANTIAL EVIDENCE.

The foundation for all the legal conclusions below is social science research evidence in the form of studies and surveys. The critical "fact" found from this research is that WEs are more sympathetic to criminal defendants than are DQs. (App. A26-A27; Supp. App. 25, 49, 71, 97). From there, the lower courts made critical corollary findings that all death-qualified juries are conviction-prone, and, since McCree's jury was death-qualified, that it was unconstitutionally selected.

If this Court finds that the research evidence is either inherently unreliable or that it fails to support those findings, it can reverse without further analysis. The Court has both the power and the duty to reexamine this evidence, and such a reexamination will reveal that McCree's data simply do not provide a sufficient basis for sweeping new constitutional rules.

In reviewing the evidence, it would be inappropriate to give deference to the findings below. The Eighth Circuit apparently did not make an independent review of the evidence; it merely stated that the evidence "supports the district court's finding that a jury with WEs stricken for cause is a conviction-prone jury." (App. A15). This Court has held, however, that the facts underlying a similar claim of bias are entitled to de novo review. *See Sheppard*, 384 U.S. at 362. Such review is entirely consistent with this Court's repeated holdings that constitutional facts should be independently reviewed by this Court. *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S.Ct. 1949, 1964 n.27 (1984); *Norris v. Alabama*, 294 U.S. 587 (1935).

Much evidence adduced by McCree was developed in response to *Witherspoon*, 391 U.S. at 520 n. 18, where this Court stated that it could not address the claims at issue here because of the "tentative and fragmentary" nature of the studies then available. The early studies measured the attitudes of laboratory subjects and survey respondents, attempting to correlate subjects' "scruples" against the

death penalty with their decision whether to convict or acquit in several hypothetical cases. (App. A17-A18)

The studies completed since *Witherspoon*, while more sophisticated, still attempt essentially the same task. In some, subjects were asked to rate, on a scale, their attitudes toward the death penalty, then were asked several questions about other criminal justice issues. The latter purported to measure "prosecution-" or "conviction-proneness." Correlations were then made between the answers on the two parts of the study. (A15-A17)

Some studies involved exposure of subjects to simulated trials, ranging from two-paragraph summaries of cases¹⁷ to thirty-minute audiotapes¹⁸ to a two-hour abbreviated videotape of a mock trial.¹⁹ The subjects were asked to render their own verdicts in the simulated cases, and these votes were correlated with their stated willingness to vote for a death sentence. (App. A15-A17) In addition, McCree introduced several surveys that allegedly show that WEs are more sympathetic to defendants.²⁰

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Goldberg, Ex. EB-27/CH-8.

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Jurrow, Ex. CH-10.

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Cowan, Thompson & Ellsworth,
Ex. CH-24 at 5, 6.

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Fitzgerald & Ellsworth, Ex. EB-64/RN-10.

Bronson/California, Ex. EB-9/RN-8.

Harris (1971), Ex. EB-32/CH-17/RH-9.

Bronson/Colorado, Ex. EB-2/RN-7.

Survey data are particularly problematic. Someone who is simply asked about a case (perhaps on the telephone) will not give the same thoughtful responses to questions with difficult factual and legal aspects that he would give if presented with the same questions sitting as a real juror. In addition, the State's witnesses criticized the superficiality of the surveys and noted that survey subjects often tend to give the answer that the questioner wants to hear. See also Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245 (1974).

The defects in McCree's approach to proving his ultimate contention are manifold. Whatever his research may have proved about laboratory subjects and survey respondents, it proves absolutely nothing about death-qualified juries in general or about his jury. The inherent problems with his research are exacerbated when it is extended vicariously to the ridiculous extreme mandated by the Eighth Circuit.

A. The lower courts' findings that the behavior of real jurors can be predicted from the attitudes of laboratory and survey subjects are not the proper basis for establishing constitutional facts.

The research shows a relationship between subjects' attitudes toward the death penalty and their purported "guilt-prone" attitudes, insofar as these attitudes are accurately measured. However, it is behavior which predicts attitudes, not vice versa. (T. 1005-1006, 1234) There is little validity to an attitude expressed on an issue to which the subject has given little thought, by one predicting his own behavior in an unfamiliar situation (T. 958-959, 1071), or on an issue elicited by one, unfamiliar, and perhaps ambiguous, question, giving the subject no opportunity to clarify or expand his position. (T. 977-980, 987, 1005, 1071)

Very few people have any prior behavioral experience with capital murder trials. Thus, subjects would be highly unlikely to be able to predict their own behavior in such an unfamiliar situation; the likelihood that their attitudes could be generalizable to predict the behavior of real jurors is even more remote. (T. 1258)

Dr. Carl Hummel, one of the State's witnesses, maintained that one can only generalize to the "real world" from simulation studies that are highly realistic. (T. 1366)²¹

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Critical reviews of mock jury research include Bridgeman & Marlowe, State's Ex. No. 4; Bermani, State's Ex. No. 9; Gerbasi, State's Ex. No. 11.

Dr. Hummel suggested that the simulations must be conducted in a real courtroom with a real judge, real attorneys and real witnesses, (T. 1366) and should also include voir dire, (T. 1010) jury instructions, (T. 1009, 1510)²² and jury deliberation. (T. 906, 1230)²³

None of McCree's studies included all these components. The closest, the Ellsworth study, (Ex. CH-24 at 5, 6) did include a two-hour videotaped trial and a half-hour of instructions, but the instructions were given by a different judge than the one who conducted the trial. In addition, one of the Ellsworth experiments included simulated deliberation, but the subjects were interrupted after only one hour and required to vote then on guilt or innocence. (Ex. CH-37/RH-43 at 2) Thus, the very best study falls short of simulating the "august" environment of the courtroom and true jury experiences. After all, in a trial, a juror's emotional stake in the outcome plays a significant role in the juror's consideration of the case. That emotional participation simply cannot be recreated in a simulated jury study.

B. WEs and DQs Were Not Reliably Identified In The Studies.

One of the major criticisms of the research is that the subjects are classified as pseudo-WEs and DQs, on the basis of one question. Dr. Gerald Shure's survey (State's Ex. 2) included a minimal simulated voir dire. With simulated "rehabilitation," many subjects changed their responses and placed themselves in different classifications. (T. 980-982, 985, 987, 1008) The ambiguity of real jurors'

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See Reed, State's Ex. No. 13; Gerbasl, State's Ex. No. 11 at 338-340. Dr. Hastie acknowledged their importance in a real trial. (T. 906)

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See, Roberts et al., State's Ex. No. 14; Bray & Noble, State's Ex. No. 15; Rumsey, et al., State's Ex. No. 16.

responses to various forms of the *Witherspoon* questions graphically illustrates the difficulty of identifying real WEs and DQs in a full voir dire, as this Court has recognized. *Witt*, 105 S.Ct. at 852 & n.6, 856-58 & n.12.

This inadequate classification is even more significant since the Court held in *Witt* that the *Witherspoon* questions are not sacrosanct and that the "standard from *Adams*" is the "proper standard" for identifying WEs. *Witt*, 105 S.Ct. at 852, referring to a prior passage at 105 S.Ct. at 850, quoting *Adams*, 448 U.S. at 45. The bottom line here is that all McCree's researchers have not only used inadequate questioning, they have also used the wrong questions.

C. *The Research Relied Upon by the Eighth Circuit Compares the Wrong Groups and Attempts to Prove the Wrong Thing.*

After purportedly identifying WEs and DQs, McCree's researchers ostensibly measured their relative conviction-proneness and concluded that WEs are more acquittal-prone than DQs. This comparison was erroneously equated to comparing death-qualified juries to nondeath-qualified juries. (App. A23-A24; Supp. App. 71)

Dr. Shure contended that the proper comparison, in jurisdictions in which ADPs are excluded from capital juries,²⁴ was between DQs and the total group of excludables—WEs plus ADPs.²⁵ (T. 1047-1049, 1054) His

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Both lower courts acknowledged that Arkansas is such a jurisdiction. (App. A26; Supp. App. 82)

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Professor Jurow identified this problem as early as 1971 and attempted to identify ADPs in his study. (T. 961-962, 1012, 1021) He agreed with the State's experts that the ADPs, as well as the WEs, would have to be excluded in order to have an unbiased jury. Ex. CH-10 at 589, 591.

study identified the ADPs in his sample population and compared DQs to WEs plus ADPs. The result indicated that, where a large number of ADPs existed, the DQs were more pro-defendant than were a combination of the excluded groups. (T. 1048-1049, 1057-1058)

Professor Bruce J. Winick, quoted extensively by the district court, was highly critical of McCree's comparisons.²⁶ He believes that, in order to properly compare the groups, DQs must be compared to all those permitted to sit on a nondeath-qualified jury—DQs, WEs and ADPs.

Even assuming that McCree's researchers correctly identified the groups and that those comparisons would tell us anything about real jurors, comparing DQs and WEs does not equate to comparing death-qualified *juries* to nondeath-qualified *juries*. Further, there are three distinct theories within the psychological community on the simple issue of how the groups should be correctly compared. This is the most graphic illustration of the lack of consensus among experts within the discipline about the research methodology—the very underpinning of the factual foundation of these opinions.

D. *Constitutional facts and sweeping changes in constitutional law should not be based on psuedo-*

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Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L.Rev. 1 (1982), quoted at length (Supp. App. 28, 91, 93, 98-100 & n.12).

It may be possible that some of these studies can be reevaluated to realign the comparison groups. If not, new empirical studies will have to be designed that compare the relevant groups as to relative conviction-proneness.

Id. at 55.

scientific studies criticized even within the psychological community.

"Proof is simply beyond the capacities of empirical social science." Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 Stan. L.Rev. 61, 79 (1975-76).

The use of . . . studies in the context of constitutional challenge to capital punishment illustrates the need for judicial procedures to evaluate statistical analysis presented by litigants in support of their positions. There is a certain danger in relying on academic work, designed to promote inquiry and further research, as a basis for deciding disputes in a court of law—especially where the stakes involved are high and the implications for society are great.

Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170, 186 (1975).

These quotations illustrate the point the State repeatedly made at the hearing: social science evidence, especially that which depends for its credibility on a reliance on statistical significance, is simply not tantamount to the "proof" which courts should require before making sweeping changes by establishing new constitutional facts and law.

Another fallacy in McCree's methodology is in assuming that statistical significance has any probative value in the legal sense. Dr. Roger Webb testified that statistical significance does not mean that there is a "difference big enough to make a difference," because such differences are not necessarily practically significant. (T. 1225) With a large enough sample size, a psychologist can make "almost any difference turn out to be statistically significant, but it may have absolutely no practical use whatsoever." (T. 1226) Dr. Webb opined that "Statistical significance is . . . the lowest form of proof. It's a demonstration that something doesn't *not* exist." (T. 1227)

Dr. Meehl (State's Ex. 5) discussed the lack of value of the findings of "soft psychology" as compared to the "hard" sciences and leveled a scathing attack on the "scientifically unimpressive and technologically worthless" research of "soft" psychology. A major reason for its lack of value is psychologists' reliance and emphasis on statistical significance. (T. 1228)

The dangers of basing constitutional doctrine on dubious factual premises are particularly clear in this case. The testimony before the district court established that there are a number of ways to analyze McCree's data. Different analyses, of course, result in different conclusions. In most cases, no expert was willing to state that any particular analysis was clearly wrong, even though some preferred one analysis to others. The difficulty for courts in determining which method of analysis may be constitutionally correct is obvious. A court simply has no rational basis for choosing among these conflicting alternatives. Moreover, the scientific consensus may change over time, leaving the Court's decision resting on a

nonexistent factual foundation.²⁷ Such difficulties may be more acceptable where a court is making a finding with respect to expert testimony about a fact that governs a single case. They cannot be overlooked when this Court is fashioning the broad contours of constitutional rights.

Survey data are particularly problematic. Someone who is simply asked about a case (perhaps on the telephone) will not give the same thoughtful responses to questions with difficult factual and legal aspects that he would give if presented with the same questions sitting as a real juror. In

27

The difficulty (or folly) of relying on such evidence to "prove anything to the extent which should be necessary to change time-tested legal procedures has been noted by at least five justices of this Court." *Ballew v. Georgia*, 435 U.S. 223, 231 & n.10, 233 n.11, 237-39 & nn.28-32; 242-43 & nn.34-37 (1978) (Blackmun, J., writing for the plurality); *Id.* at 246 & n. * (Powell, J. concurring); *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976) (Stewart, J., writing for the plurality); *Id.* at 233-36 (Marshall, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 354-55 & n.7 (1976) (White, J., dissenting).

See also *McCleskey v. Kemp*, 753 F.2d 877, 887-88 (11th Cir. 1985), in which the court recognized that the "broad issue before [the court] concern[ed] the role that social science is to have in judicial decisionmaking."

As specific criticisms, the court noted:

(1) the imprecise nature of the discipline; (2) the potential inaccuracies in presented data; (3) the potential bias of the researcher; (4) the inherent problems with the methodology; (5) the specialized training needed to assess and utilize the data competently; and (6) the debatability of the appropriateness for courts to use empirical evidence in decisionmaking.

See Tanke & Tanke, *Getting Off a Slippery Slope*, 34 Am. Psych. 1130 (1979). The authors note that "few persons, social scientists included, would be content to have fundamental constitutional liberties turn on the results of the latest experimental study." *Id.* at 1138. See also Gerbasi, State's Ex. 11 at 340-342.

addition, the State's witnesses criticized the superficiality of the surveys and noted that survey subjects often tend to give the answer that the questioner wants to hear. *See also* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245 (1974).

CONCLUSION

For these reasons, the decision below should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

(9)
No. 84-1865

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

A. L. LOCKHART, Director,
ARKANSAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

ARDIA V. MCCREE,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

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Questions Presented

As used in these questions, "death qualification" refers to the practice of excluding for cause from the capital trials of guilt or innocence all potential jurors who could be fair and impartial on that issue, but who would not consider voting for a death sentence at a penalty trial.

1. Is there substantial support in the record for the findings of the two lower federal courts that death qualification produces juries that are uncommonly predisposed to favor the prosecution, and uncommonly prone to convict?

2. Does death qualification violate a capital defendant's right to a trial on guilt or innocence by an impartial jury because of the proven fact that death-qualified juries are "less than neutral on the issue of guilt," i.e., because it

enables the State to enhance its chances of obtaining a conviction by asking that the defendant be punished by death?

3. Is there substantial support in the record for the findings of the two lower federal courts that the jurors who are excluded by death qualification are a sizeable and distinctive group in the community, and that they share a distinctive constellation of attitudes on important criminal justice issues?

4. Does death qualification violate a capital defendant's rights to a trial on guilt or innocence by a jury that reflects a fair cross section of the community, because it excludes from the pool of prospective jurors who are eligible to serve at the guilt phase of capital cases a group that is distinctive both in its attitudes and predispositions, and in its behavior on juries?

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Table Of Authorities	vi
Introduction	1
Statement Of The Case	4
(i) Legal Background	4
(ii) Procedural History Of This Case	6
(iii) Scientific Record	8
a. The Nature Of The Record	8
b. McCree's Evidence ..	11
c. The State's Claims	15
(iv) The Decisions Below	17
Summary Of Argument	18
Argument	22
I. Background	22
II. The Record Demonstrates That Death Qualification "Substantially Increases The Risk Of Conviction" And Creates A Jury That Is "Less Than Neutral" On The Question Of Guilt Or Innocence	29

	<u>Page</u>
A. Common Knowledge	29
B. The Record And The Findings	32
C. The Standard Of Review	35
D. Arkansas' Factual Contentions	37
1. Studies Of Simulated Juries	38
2. Identification Of The Death Penalty	38
3. The Relevance Of Juror Behavior ...	41
4. The Exclusion Of ADPS	42
5. The Value Of Social Science	43
E. The Factual Contentions Of Amici Curiae ...	49
F. Summary	52
III. The Non-Neutrality Of Death-Qualified Juries Violates A Capital Defendant's Sixth And Fourteenth Amendment Rights To A Fair And Impartial Jury At the Trial Of Guilt Or Innocence	55
A. The Right To a Fair And Impartial Jury	56
B. The Arguments In Opposition	65

	<u>Page</u>
1. The "Bias" Of Death-Qualified Jurors ..	65
2. The Risk Of Partiality On Guilt	69
3. State Interests	74
4. The Meaning Of Neutrality	80
IV. Death Qualification Violates A Capital Defendant's Sixth And Fourteenth Amendment Rights To A Trial On Guilt Or Innocence By A Jury That Reflects A Fair Cross-Section Of The Community	82
A. The Representative Cross-Section Requirement	82
B. The Decisions Below	85
C. The State's Arguments For Reversal	87
1. Representativeness On Petit Juries	87
2. The Cognizability Of The Excluded Group	89
Conclusion	92
Appendix: <u>Major Empirical Studies</u>	94

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Adams v. Texas, 448 U.S. 38 (1980)	17,42
Anderson v. City of Bessemer City, North Carolina, 53 U.S.L.W. 4314 (1985)	35
Ballard v. United States, 380 U.S. 102 (1965)	58,66
Ballew v. Georgia, 435 U.S. 223 (1978)	46,57,74,87
Beck v. Alabama, 447 U.S. 625 (1980).....	64
Bose Corp. v. Consumers Union of U.S., Inc. 104 S.Ct. 1949 (1984).....	36,37
Bowers v. State, 298 Md. 115, 468 A.2d 101 (1983).....	28
Brice v. State, 264 Md. 352, 286 A.2d 132 (1972)	28
Brown v. Louisiana, 447 U.S. 323 (1980)	60,89
Buford v. State, 403 So.2d 943 (Fla. 1981)	77

	<u>Page</u>
Bumper v. North Carolina, 391 U.S. 543 (1968).....	6
Burch v. Louisiana, 441 U.S. 130 (1979).....	59,74
Burr v. State, 466 S.2d 1051 (Fla. (1985).....	77
Castaneda v. Partida, 430 U.S. 483 (1977).....	48
Clark v. State, 573 S.W.2d 622 (Ark. 1980)	22
Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278 (1960).	37
Commonwealth v. Leshner, 17 Serg. & Rawles 155 (Pa. 1828).....	25
Connally v. Georgia, 429 U.S. 245 (1977)	62
Dennis v. United States, 339 U.S. 169 (1949).....	68,70
Duncan v., Louisiana, 391 U.S. 145 (1968).....	56,57,82
Duren v. Missouri, 439 U.S. 357 (1979).....	66,70,75,86
Enmund v. Florida, 458 U.S. 782 (1982).....	52
Estelle v. Williams, 425 U.S. 501 (1976).....	61
Glasser v. United States, 315 U.S. 60 (1942).....	57,58

	<u>Page</u>
Graver Tank & Mfg. Co. v. Linde, 336 U.S. 271 (1949).....	36
Gregg v. Georgia, 428 U.S. 153 (1976).....	46
Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), <u>aff'd</u> , 758 F.2d 226 (8th Cir. 1985) (en banc)	<u>passim</u>
Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark. 1980) <u>aff'd as</u> <u>modified</u> , 637 F.2d (8th Cir. 1980) ("Grigsby I")	7,41
Haynes v. Washington, 373 U.S. 503 (1963).....	37
Hazelwood School District v. United States, 433 U.S. 299 (1977)	48
Hicks v. State, 424 So.2d 1137 (Fla. App. 1982)	31
Hovey v. Superior Court, 28 Cal.3d 1, 616 F.2d 1301 (1980)..	9,11,15,54
In re Murchison, 349 U.S. 133 (1955).....	56,62
Irvin v. Dowd, 366 U.S. 717 (1961)	37,61
Johnson v. Mississippi, 403 U.S. 212 (1971).....	56

	<u>Page</u>
Keeten v. Garrison, 578 F. Supp. 1164 (W.D.N.C. 1984), <u>rev'd</u> , 742 F.2d 129 4th 1984), <u>petition</u> <u>for cert. pending</u> , No. 84- 5187.....	11,53,54,81
Lyons v. Oklahoma, 322 U.S. 717 (1944).....	37
Mason v. State, 18 Md. App. 130, 305 A.2d 492 (1973).....	28
McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985)(en banc) ...	47
Miller v. Fenton, 54 U.S.L.W. 4022 (U.S. Dec. 2, 1985)	36
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).....	61,63
Neil v. Biggers. 409 U.S. 188 (1972)	36
Nettles v. State, 409 So.2d 85 (Fla. App. 1982).....	31
Parker v. Gladden, 385 U.S. 363 (1966).....	60
Patton v. Yount, 104 S.Ct. 2885 (1984).....	37,61,68
People v. Coleman, 38 Cal.3d 69, 695 P.2d 189 (1985).....	32
People v. Damon, 13 Wend. 351 (N.Y. 1835).....	25

	<u>Page</u>
People v. Green, 15 C.A.3d 524, 93 Cal. Rptr. 84 (Cal. App. 1971)	80
People v. Miller, 245 Cal. App. 112, 53 Cal. Rptr. 720 (1966), <u>cert. granted on</u> <u>other issues</u> , 389 U.S. 958, <u>cert. dismissed as improvi-</u> <u>ently granted</u> , 392 U.S. 616 (1967)	30
People v. Riser, 47 Cal.2d 566, 305 P.2d 1 (1956)	27
People v. Rollins, 179 Cal. 793, 249 P. 859 (1919)	27
Peters v. Kiff, 407 U.S. 493 (1972)	66,92
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	35
Rector v. State, 659 S.W.2d 168 (Ark. 1983)	78
Roberts v. Louisiana, 428 U.S. 325 (1976)	47
Rushen v. Spain, 464 U.S. 114 (1983)	37

	<u>Page</u>
Sheppard v. Maxwell, 384 U.S. 333 (1966)	61,62
Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981)	53,81
Smith v. Phillips, 455 U.S. 209 (1982)	68
Smith v. Texas, 311 U.S. 128 (1940)	57,66
Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) ...	54,69,81
State v. Bowman, 80 N.C. 432 (1879)	25
State v. Garrington, 11 S.D. 178, 76 N.W. 326 (1898)	27
State v. Hall, 612 S.W.2d 782 (Mo. 1981)	32
State v. Kennedy, 8 Rob. 590 (La. 1845)	25
State v. Lee, 91 Iowa 499, 60 N.W. 119 (1894)	27
State v. Leland, 227 P.2d 785 (Ore. 1951)	27
State v. Mercer, 618 S.W.2d 1 (Mo. 1981)	31

	<u>Page</u>
State v. Monturi, 195 N.J. Super, 317, 478 A.2d 1266 (N.J. Super. 1984).....	79
State v. Riley, 126 Wash. 256, 218 P. 238 (1939).....	27
State v. Strickland, 609 S.W.2d 392 (Mo. 1980).....	31,32
State v. Wilson, 234 Iowa 60, 11 N.W.2d 737 (1943).....	27
Strauder v. West Virginia, 100 U.S. 303 (1880)	58,66
Sumner v. Mata, 455 U.S. 591 (1982)	37
Swain v. Alabama, 380 U.S. 102 (1965)	89
Taylor v. Hayes, 418 U.S. 488 (1974)	56
Taylor v. Louisiana, 419 U.S. 522 (1975)	66,70,75,86,87
Tumey v. Ohio, 273 U.S. 510 (1927)	62,74
United States v. Cornell, 25 F. Cas. 650 (C.C.D.R.I. 1820) (No. 14,868)	25
United States v. Doe, 104 S.Ct. 1237 (1984)	36

	<u>Page</u>
United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976)	68,71
United States v. Wood, 299 U.S. 123 (1936)	70
Wainwright v. Witt, 105 S.Ct. 844 (1985)	40,68,71,72
Ward v. Monroeville, 409 U.S. 57 (1972)	62
White v. State, 16 Tex. 206 (1856) ..	25
Williams v. Florida, 399 U.S. 78 (1970)	57,66
Williams v. State, 3 Ga. 453 (1847)	25
Witherspoon v. Illinois, 391 U.S. 510 (1968)	passim
<u>Other Authorities</u>	
Bentele, <u>The Death Penalty in Georgia: Still Arbitrary</u> , 62 Wash. U.L.Q. 573 (1985)	30
Bowers, <u>Executions in America</u> (1974)	26
Ellsworth & Ross, <u>Public Opinion and Capital Punishment: A Close Examination of the Views of Abolishments and Retentionists</u> , 29 Crime & Delinquency 116 (1983)	93

	<u>Page</u>
Hastie, Penrod and Pennington, <u>Inside the Jury</u> , (1983)	9,93
Kalven & Zeisel, <u>The American Jury</u> (1966)	51,52
Oberer, <u>Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?</u> , 39 Texas L. Rev. 545 (1961)	25,30
Passel, <u>The Deterrent Effect of the Death Penalty: A Statistical Test</u> , 28 Stan. L. Rev. 61 (1975-76)	43
Tanke & Tanke, <u>Getting off the Slippery Slope, Social Science in the Judicial Process</u> , 34 Am. Psych. 1130 (1979)	44
Vidmar & Ellsworth, <u>Public Opinion and the Death Penalty</u> , 26 Stan. L. Rev. 1245 (1974) ...	45
 <u>Statutes</u>	
F.R. Civ. P. 52(a)	35
Ark. Crim. Code § 41-1358 (Supp. 1985)	78

INTRODUCTION

The issues in this case concern the practice known as "death qualification," a procedure under which prospective jurors in capital trials are examined at length during voir dire on their attitudes toward the death penalty. All jurors who state that they cannot consider a sentence of death are excluded for cause, not merely from the penalty phase, but also from the guilt-or-innocence phase -- even if their voir dire establishes that they would be entirely fair and impartial in determining guilt or innocence.

Arkansas' power to exclude at the penalty phase those jurors who could not consider imposing a death sentence is not in question here. Nor is its power to remove, at the guilt phase, those jurors whose opposition to the death penalty would prevent them from serving as fair and impartial jurors on the issue of

guilt or innocence. The narrow question presented is whether the State may constitutionally exclude for cause, from the trial of guilt or innocence, all jurors who could follow the law and fairly determine guilt or innocence in a capital case but could not impose a sentence of death in a subsequent penalty proceeding, if there were one (hereafter, "Witherspoon excludables").

McCree has established (i) that this group of prospective jurors shares distinctive attitudes pertinent to the tasks that a representative jury is supposed to perform at the trial of a criminal case, and (ii) that juries whose perspectives have been narrowed by excluding all such jurors are more prone than ordinary juries to favor the prosecution, and to convict. These facts were found by the United States District Court for the Eastern District of Arkansas after hearing nearly two weeks of expert and lay testimony. The District Court

received and considered every competent scientific study ever conducted on the effects of death qualification, a body of research spanning nearly three decades. The leading experts in the field appeared either in person or through their transcripts and reports. The methodology and the findings of each study received intensive examination and review by the witnesses for both sides. Studies and testimony directly relevant to juror attitudes in the State of Arkansas were presented. Following this extensive hearing, the District Court issued a lengthy opinion, setting forth detailed findings of fact, holding that respondent had amply proven his factual contentions, and concluding that the facts established a violation of his Sixth and Fourteenth Amendment rights to a fair and impartial jury, and to a jury selected from a representative cross-section of the community. The Eighth Circuit, en banc, affirmed.

STATEMENT OF THE CASE

(i) Legal Background

In 1968, this Court decided Witherspoon v. Illinois, 391 U.S. 510 (1968). Witherspoon had urged, on two separate grounds, that the Constitution forbade Illinois to "death-qualify" a capital jury by excluding for cause all prospective jurors who expressed "'conscientious scruples against capital punishment,'" Witherspoon v. Illinois, supra, 391 U.S. at 512. First, he argued that juries "selected in this manner ... must necessarily be biased in favor of conviction [and] '... partial to the prosecution on the issue of guilt or innocence,'" id. at 516-17. Second, he argued that jurors should not be excluded from the penalty determination "simply because they voiced general objections to the death penalty," id. at 522. The Court agreed with Witherspoon's second argument and forbade exclusion of

prospective jurors "on any broader basis" than an opposition to capital punishment so strong that the jurors would either automatically vote against death in any case, or be incapable of making "an impartial decision as to the defendant's guilt given the prospect of a death sentence." Id. at 522-23, n.21 (emphasis in original).

The Court in Witherspoon refused to accept the claim that death qualification rendered the jury conviction-prone. Observing that "[t]he data adduced by the petitioner ... are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution," id. at 517, the Court declined "either on the basis of the record now before us or as a matter of judicial notice," id. at 518, to accept the facts on which this claim was based. However, the Court explicitly invited further evidence on the issue:

[A] defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence -- given the possibility of accomodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.

Id. at 520, n.18. See also, Bumper v. North Carolina, 391 U.S. 543, 545 (1968). In the present case the Court's prediction is fulfilled. A defendant convicted by a death-qualified jury has proven that it was less than neutral with respect to guilt. The question reserved in Witherspoon is now unavoidable.

(ii) Procedural History of this Case.

The evidentiary hearing comprising the record in this case was first scheduled in the habeas corpus case of James T. Grigsby, now deceased. In

January, 1980 the United States District Court for the Eastern District of Arkansas ordered Grigsby's case remanded to the Arkansas trial court in which he had been convicted of murder, for a hearing on his challenge to death qualification. Grigsby v. Mabry, 483 F. Supp. 1372, 1390-91 (E.D. Ark. 1980) ("Grigsby I"). On appeal the Eighth Circuit affirmed but modified the judgment and ordered the evidentiary hearing on death qualification to be conducted in the federal district court, 637 F.2d 525 (8th Cir. 1980); and on remand McCree's case was consolidated with Grigsby's for the purpose of this hearing.¹

In July of 1981 the district court heard extensive evidence on the effects of death qualification. On August 5, 1983, after thorough briefing from both

¹The State stipulated to McCree's right to pursue these issues in federal habeas corpus. Grigsby v. Mabry, Mem. & Order, 8/18/83, at 3 n.3; JA 18-19 n.3.

sides, the court sustained McCree's claims and ordered the State of Arkansas to release or retry him within 90 days.² Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983) ("Grigsby"). The State appealed and the Eighth Circuit affirmed. 758 F.2d 226 (8th Cir. 1985).

iii. The Scientific Record.

a. The Nature of the Record.

The scientific record in this case is the polar opposite of the "tentative and fragmentary" presentation in Witherspoon:

[T]he record is exhaustive; it is difficult to perceive how any petitioner could make a record and an objection to death-qualified juries, as constituting an improper jury for the determination of guilt-innocence, more complete than that presented here....

Grigsby, 758 F.2d at 238. Four witnesses testified in McCree's case in chief, three experts and one lay witness; and a transcript of the testimony of another

²Mr. Grigsby died in prison shortly before this order was entered.

expert was introduced in evidence.³ These witnesses discussed a host of studies on the effects of death qualification, presented some 270 evidentiary exhibits, id., 569 F. Supp. at 1293, and were carefully cross examined. The state in its case

³The expert witnesses were Dr. Edward Bronson, RT 416-682; 569 F. Supp. at 1291-92; 758 F.2d at 235; Dr. Craig Haney, RT 39-415; 569 F. Supp. at 1292; 758 F.2d at 235; and Dr. Reid Hastie, RT 683-938; 569 F. Supp. at 1292; 758 F.2d at 235. A transcript of the testimony of Dr. Phoebe Ellsworth at the evidentiary hearing in Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301 (1980), was admitted in evidence during the testimony of Dr. Haney. Ex. CH-31-A; RT 166-69, 190-93; see 569 F. Supp. at 1299. McCree's expert witnesses are all recognized authorities in forensic psychology and sociology; they have all done extensive work studying legal institutions in general and jury attitudes and behavior in particular; two of them (Ellsworth and Hastie) are noted methodologists; three (Bronson, Ellsworth and Haney) are authors of published studies on the effects of death qualification, and the fourth (Hastie) is the lead author of the most extensive contemporary study of jury decision-making (Hastie, Penrod and Pennington, Inside the Jury, Harvard Univ. Press: Cambridge, Mass. 1983).

The lay witness in McCree's case in chief was Mr. Dale Enoch, president of Precision Research, Inc., of Little Rock, Arkansas, who presented a survey of death penalty attitudes in Arkansas in 1981 (see infra, App. p. 98).

presented three expert witnesses,⁴ and McCree presented two lay witnesses in rebuttal.⁵

After examining all of the surveys and considering extensive testimony, the district court concluded that [McCree] had proven a jury with WE's [Witherspoon excludables] stricken for cause is a conviction-prone jury.

758 F.2d at 235, citing 569 F. Supp. at

⁴The state's major expert witness, Dr. Gerald Shure, did not disagree with McCree's experts on most points, 569 F. Supp. at 307; 758 F.2d at 235-36, but presented a study of his own on a separate issue -- the exclusion of "automatic death penalty jurors" -- which we will discuss below. The district court found that Dr. Shure's "educational credentials are excellent ... [b]ut his interest and experience in the behavior of juries has been relatively limited." 569 F. Supp. at 1307. The other two state's witnesses were psychologists, Dr. Roger Webb and Dr. Carl Hummel, who presented no evidence of their own but criticized McCree's studies and the conclusions the other witnesses drew from them. The value of their testimony was limited by the fact that neither had done any research on the issue or had any background whatever in forensic psychology or jury studies.

⁵McCree's rebuttal witnesses were Ms. Elizabeth Montgomery, Senior Analyst at Louis Harris and Associates, who testified about a survey on "automatic death penalty excludables," RT 1572-1617 (see *infra* App. p. 106), and Ms. Andrea Young, who testified about a study of capital *voir dire* transcripts in Arkansas, RT 1677-1728 (see *infra*, App. p. 107).

1293-1305. This finding reflects the evidence. Despite its volume the record is notably one-sided:

[T]here are no studies which contradict the studies submitted [by McCree]; in other words, all of the documented studies support the district court's findings.

758 F.2d at 238.

b. McCree's Evidence.

The evidence in the record is so extensive that it cannot possibly be described within the limits of this brief. Fortunately it is discussed with specificity in the opinions below, 569 F. Supp. at 1291-1308, 758 F.2d at 232-38, and in two opinions in other cases with similar empirical records, Hovey v. Superior Court, 28 Cal.3d 1, 26-69, 74-80, 616 P.2d 1301, 1314-48, 1350-53 (1980), and Keeten v. Garrison, 578 F. Supp. 1164, 1171-79 (W.D.N.C. 1984), rev'd, 742 F.2d 129 (4th Cir. 1984), petition for cert. pending, No. 84-5187. For the convenience of the Court, we have included in this

brief an Appendix that summarizes the methodology and findings of the major studies, and provides detailed references. At this point we will confine our discussion to the principal findings of the body of research that is before the Court.

(1) Several surveys show that a substantial portion of those jurors who could be fair and impartial on guilt and innocence in a capital case -- from 11 to 17% or more -- are excluded by death-qualification. 569 F. Supp. at 1285; 758 F.2d at 231-21. See infra, App. pp. 94-98 .

(2) Blacks and women are disproportionately excluded by death qualification. 569 F. Supp. at 1283, 1293-94. This pattern has been found by numerous studies, and it was not disputed by the State. See infra, App. pp. 97-98 .

(3) Death-qualified jurors are systematically different in their perspectives from those who are excluded by death qualification: They are more

likely to believe that a defendant's failure to testify indicates guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, less concerned about the danger of erroneous convictions, etc. 569 F. Supp. at 1283, 1293, 1304; 758 F.2d at 232-33, 237. These conclusions are based on the uniform findings of a series of surveys conducted across the country over a period of more than a decade, see infra, App. pp. 94-98; they were apparently conceded by the State's experts. See, e.g., RT 1081-82 (Dr. Shure), 1221-22 (Dr. Webb).

(4) Experimental evidence demonstrates that the process of death-qualifying a jury predisposes the jurors to believe that the defendant is guilty. 569 F. Supp. at 1302-05; 758 F.2d at 234. See infra, App. pp. 98-99.

(5) Death-qualified jurors are more likely to vote to convict on the same evidence than those jurors who are

excluded. 569 F. Supp. at 1294-1302; 758 F.2d at 233-36. This is the common finding of six studies in the record, and it is supported by several additional studies on jury decision-making and deliberation. See infra, App. pp.99-106. The same pattern is found in each study, despite the fact that they were conducted over more than three decades and in several regions of the nation. It is unaffected by the exact death-penalty question used to identify the two groups, or by the form of the study -- tabulations of votes of actual jurors in felony trials, or experimental simulations of criminal cases -- with one important qualification: the more sophisticated and realistic the simulation, the larger the effect.⁶

⁶For example, the Goldberg study in 1966 (see infra, App. p. 101) used written descriptions of criminal cases, and compared college-student subjects who had "conscientious scruples" against the death penalty with similar subjects without such scruples; it found a 6% difference in the proportion of votes to convict ($p < .08$). By

c. The State's Claims.

Apart from expressions of general skepticism about the validity of the scientific research (which we will address infra), the State's principal evidence focused on its claim that the studies did not adequately account for the possible exclusion for cause of "automatic death penalty jurors" (ADP's) -- those potential jurors who would automatically vote for the death penalty upon conviction in any capital case, regardless of the evidence -- and that such exclusion might counteract the bias caused by excluding those who would never vote for the death penalty.⁷ In support of this claim, the

comparison, the Ellsworth/Thompson/Cowan study in 1979 (see infra, App. p. 102) used a highly realistic 2-1/2 hour videotape of a homicide trial, with arguments and instructions, and compared jury-eligible community subjects who could be fair and impartial on guilt in a capital case but who would not consider imposing the death penalty, with fair and impartial death-qualified subjects; it found a highly statistically significant 25% difference in the proportion of votes to convict ($p < .01$).

⁷A similar argument prevailed in Hovey v.

State's chief expert, Dr. Gerald Shure, testified about a study he conducted in West Los Angeles which appeared to find that ADP's constituted 33.3% of the population. 569 F.Supp. at 1307-08; 758 F.2d at 235-38. Dr. Shure, however, candidly acknowledged that his survey was unrepresentative and flawed, and that this result was far too high and not to be believed. Grigsby, 569 F. Supp. at 1308; 758 F.2d at 236 n.17; see also, e.g., RT 996, 1008, 1051, 1091, 1109, 1181, 1199. On cross examination he admitted that the questions he used did not determine whether the respondents would vote for death automatically in all capital cases, but whether they would do so for a particularly grisly murder that was described to them in detail. Id., 569 F. Supp. at 1307.

Superior Court, 28 Cal.3d 1, 616 P.2d 1301 (1980). In Hovey, however, the record contained no credible evidence on the ADP issue, while the present record includes extensive evidence on this point.

On rebuttal, McCree presented evidence of two studies on the ADP issue (see infra, App. pp.106-08) which showed that only 1% of a representative sample of the national population falls in the ADP category, and that only 0.5% of potential jurors examined in a large sample of Arkansas capital voir dieres were in fact excused on this ground. On this evidence, the district court and the court of appeals both found that "the number of ADP's was negligible" and "contributes only to the appearance of fairness" in capital jury selection. 569 F. Supp. at 1308; 758 F.2d at 238; see also Adams v. Texas, 448 U.S. 38, 49 (1980).

(iv.) The Decisions Below.

After analyzing all of the evidence, the district court held (1) that a death-qualified jury is unduly conviction prone -- "less than neutral" with respect to guilt -- in violation of a capital defendant's Sixth and Fourteenth Amendment

rights to a fair and impartial jury, and (2) that such a jury is unrepresentative of the community from which it is drawn, in violation of the representative cross-section requirement of the Sixth Amendment. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983). The Eighth Circuit affirmed, holding that death qualification violates the representative cross-section requirement in the determination of guilt in capital cases because it produces juries that are uncommonly prone to convict. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985).

SUMMARY OF ARGUMENT

Our argument does not follow the sequence of the State's. After specifying the issue presented (infra, pp. 22-29), we summarize the evidentiary record and the reasons for accepting the concurrent factual findings of two courts below that a death-qualified jury is neither impartial nor representative (infra, pp. 29-36). We

then address the attacks upon those findings made by the State (infra, pp. 37 - 49) and its amici (infra, pp. 49-52).

We develop the Sixth Amendment concept of an "impartial jury" (infra, pp. 55 -58) and demonstrate the ways in which a death-qualified jury offends that concept (infra, pp. 58-64), before addressing the State's criticisms of this constitutional analysis (infra, pp. 65-82). We close with a parallel discussion of the Sixth Amendment concept of a representative jury (infra, pp. 82-85); of the ways in which death-qualification offends that concept (infra, pp. 85-86); and of the State's criticisms of the latter analysis (infra, pp. 87-93).

It may assist the Court for us to pinpoint where, within this framework, the State's principal arguments are taken up:

1. The State's lead argument, based upon its interests in having a single jury decide both guilt and penalty in a capital

case (State's Br. at 8-19), is answered infra at pp. 74-80 . The few concrete justifications offered by the State to support its preference for a unitary jury are unconvincing; collectively they lack the force required to subordinate a defendant's Sixth Amendment interests; indeed, Arkansas itself subordinates its interest in a "unitary jury" to other interests less weighty than the defendant's right to a fair jury trial.

2. The State's contention that the Eighth Circuit used "improper constitutional analyses" (State's Br. at 19-40) is answered infra at pp. 65-68 and 87-93 . The State is wrong in asserting that the decision below rests in any part either upon "the imputation of bias to [death-qualified] jurors as a group" (State's Br. at 28) or upon a finding "of the partiality of [McCree's] ... individual jurors" (id. at 26). It was McCree's jury, not its individual members, that the Eighth

Circuit held insufficiently balanced to meet the Sixth Amendment's commands. And it is the State, not the Eighth Circuit, whose analyses of the Sixth Amendment are improper. If the State were right in either of its two basic Sixth Amendment submissions -- that "attitudes alone" (State's Br. at 35) cannot define "a distinctive group for cross-section purposes" (id. at 32); and that the cross-section requirement applies only to jury pools, not to petit juries (id. at 39-40) -- then it could constitutionally give its prosecutors a challenge for cause to any venireperson who admitted on voir dire belonging to the NAACP or admiring Martin Luther King, Jr.

3. The State's objections to the factual findings of the courts below (State's Br. at 40-50) are answered infra at pp. 37-49 . Each of these objections was thoroughly considered by the district and the circuit court, and rejected for

reasons having ample evidentiary support.

ARGUMENT

I. BACKGROUND

"Death qualification," as Arkansas uses it, is an extraordinary procedure. At the outset of a capital trial, before they have heard any evidence on guilt or innocence, jurors are questioned, often at length, about their willingness to sentence the defendant to death, and those who might not be able to impose capital punishment are excluded from the decision on guilt as well as the decision on penalty. This practice highlights punishment before guilt is proven,⁸ and it alters the composition of the jury so as

⁸This process can be quite heavy-handed. For example, in Clark v. State, 573 S.W.2d 622 (Ark. 1980), the prosecutor's questioning included the following: "Ma'am this is a murder case, two counts of murder, and one of the penalties in it is the death penalty and that is what I am going to be asking for. I am going to be asking the jury if they find this man guilty, I am going to ask them to put him in the electric chair and turn on the juice on him until he dies. The shock goes all through him." 573 S.W.2d at 626 (Howard, J., dissenting).

to narrow the range of viewpoints reflected on it. The practice is invoked solely by the prosecutor's discretionary decision to ask for the death penalty; nothing similar happens in non-capital trials.

The constitutional principles advocated by McCree call for a simpler process -- contrary statements by Arkansas and its amici notwithstanding. Voir dire at the guilt phase of capital cases should be restricted to the issues presented at that stage: prospective jurors should neither be questioned about nor excused for attitudes that are relevant only to a decision on penalty that may never be necessary. This will simplify and shorten the voir dire at the guilt phase of all capital cases; it will bring jury selection in capital trials more into line with practice in other criminal cases. It may require some additional sifting at the penalty phase -- the phase at which attitudes on punishment become relevant --

for the fraction of cases which reach that stage. Or it may not. In the past some states have eliminated death qualification entirely, and administered capital punishment statutes with no particular problems. (See infra pp. 27-28.) But if a state wishes to exclude from capital sentencing decisions all jurors whom it is constitutionally permitted to exclude, it will be able to do so with little or no difficulty.⁹ The end result will be a capital guilt-determining jury similar to the juries that determine guilt in all non-capital cases, from misdemeanors to murders.

Death qualification is not an inevitable feature of the administration of capital punishment. It was never used

⁹The Eighth Circuit suggested (but did not order) two different procedures as remedies, both based on the use of alternate jurors who sit through the guilt and innocence phase and are substituted onto the jury for the penalty phase. Neither procedure would require a retrial of the issues determined at the guilt phase, and, as the Eighth Circuit noted, "[n]either procedure should significantly affect the cost or efficiency of the trial." 758 F.2d. at 243.

in England,¹⁰ and it has not always been used in this country. Despite the prevalence of the death penalty in the early years of the Republic, the first reported use of death qualification was in 1820, United States v. Cornell, 25 F. Cas. 650 (C.C.D.R.I 1820) (No. 14,868), and after that the practice caught on only gradually.¹¹ By 1850 death qualification was employed in most American jurisdictions but only to eliminate jurors who could not convict of a capital offense. That form

¹⁰See Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Texas L.R. 545, 566-7 n. 92 (1961), and authorities cited therein.

¹¹See, e.g., Commonwealth v. Leshner, 17 Serg. & Rawles 155 (Pa. 1828) (earliest Pennsylvania death qualification case; described by both majority and dissent as without precedent); People v. Damon, 13 Wend. 351, 355 (N.Y. 1835) (earliest New York case; cites no precedent); State v. Kennedy, 8 Rob. 590 (La. 1845) (earliest Louisiana case); Williams v. State, 3 Ga. 453 (1847) (earliest Georgia case); White v. State, 16 Tex. 206 (1856) (earliest Texas case); State v. Bowman, 80 N.C. 432 (1879) (apparently earliest North Carolina case).

of death qualification is not in dispute.

When death qualification was introduced in America, capital punishment laws universally provided for mandatory death penalties. By the 1880's most states moved to discretionary death penalties. See Bowers, Executions In America 8-9 table 1-2 (1974). This change created the category of jurors who are at issue here: those who can fairly and impartially determine guilt or innocence in a capital case but who would never vote to impose a death sentence. Most states did not modify their statutory death-qualification provisions to cover this group; instead, state courts gradually reinterpreted existing statutes to permit the exclusion of the new category of jurors, see Witherspoon, supra, 391 U.S. at 513-14 n.

5. In some states there is no case law on the point for decades, during which it is unclear whether death qualification was restricted to those jurors who could not

convict in a capital case.¹² Two states -- Iowa, State v. Lee, 91 Iowa 499, 60 N.W. 119 (1894); State v. Wilson, 234 Iowa 60, 11 N.W.2d 737 (1943), and South Dakota, State v. Garrington, 11 S.D. 178, 76 N.W. 326 (1898) -- affirmatively rejected any death qualification under their new discretionary statutes, while continuing to administer capital-sentencing laws into the 1960's with no apparent trouble.¹³

¹²Thus, for example, California adopted a discretionary death penalty statute in 1874, Bowers, supra, at 8, but the first case suggesting a broadening of death qualification beyond jurors who could not convict appeared in 1919, People v. Rollins, 179 Cal. 793, 249 P. 859 (1919), and formal reinterpretation of the statute did not occur until 1956. People v. Riser, 47 Cal.2d. 566, 573-76, 305 P.2d. 1 (1956). Similarly, Oregon adopted a discretionary death penalty statute in 1920, Bowers, supra, at 8, but its courts did not reinterpret its death-qualification statute for 31 years, State v. Leland, 227 P.2d. 785, 796-97 (Ore. 1951); and Washington enacted a discretionary statute in 1919, Bowers, supra at 8, but did not reinterpret its death-qualification statute until State v. Riley, 126 Wash. 256, 260-64, 218 P. 238, 258-64 (1939), twenty years later.

¹³In Iowa there were 31 executions between

Maryland forbade the exclusion of any juror because of attitudes toward the death penalty from 1967 through 1969, see Brice v. State, 264 Md. 352, 361-62, 286 A.2d 132, 137 (1972) (noting change in law), and has restricted death qualification to the issue of guilt since 1973. Md. Code (1974) sec. 8-201(c); see Bowers v. State, 298 Md. 115, 468 A.2d. 101, 116-18 (1983); Mason v. State, 18 Md. App. 130, 138-40, 305 A.2d. 492 (1973). In sum, death qualification was not practiced when the Constitution was adopted; it was originally designed only to exclude jurors who would be unwilling to convict on capital charges; and it has not been

1894 and 1963, Bowers, supra, at 269, and in South Dakota there was one, but several death sentences were commuted during World War II because "it was impossible to get materials for an electric chair..." Id. at 367. The numbers of death sentences in each state were undoubtedly larger, since a considerable number of death sentences are commuted or reversed on appeal in the ordinary course of events, and the numbers of capital convictions (including those resulting in life sentences) were undoubtedly larger yet.

universally used in states with death penalty statutes even in this century.¹⁴

II. THE RECORD DEMONSTRATES THAT DEATH QUALIFICATION "SUBSTANTIALLY INCREASES THE RISK OF CONVICTION" AND CREATES A JURY THAT IS "LESS THAN NEUTRAL" ON THE QUESTION OF GUILT OR INNOCENCE.

A. Common Knowledge

The recognition that death qualification eases the prosecution's proof is hardly novel. Trial lawyers and judges have long known this is so.

¹⁴The states of Alabama, et al., amici curiae, argue that "[n]o state has ever required the cumbersome" jury selection procedure ordered by the Eighth Circuit, and that this "impractical approach was not in use when the constitutional provision here at issue was adopted, and those who drafted it would be surprised to learn that they had thereby destroyed the traditional role of juries in capital cases." Brief of Amici Curiae, Alabama, et al. (hereinafter "Alabama Amicus Brief") at 27. As on other issues (see infra p.50) amici are misinformed, in at least three respects: (1) The relief ordered by the Eighth Circuit is a simplification of existing practice. (2) As we have pointed out, some states have done without death qualification for long periods of time. (3) Death qualification was not "traditional" in 1791 when the Sixth Amendment was adopted; it was unknown in this country throughout the 18th century, and was never practiced in England.

In unguarded moments, some prosecutors have explicitly admitted that they ask for the death penalty in weak cases in order to get death-qualified juries and thereby increase their chances of obtaining convictions.¹⁵ The actions of many other prosecutors are equally telling: often they will ask for the death penalty, obtain a conviction for a capital crime, and then waive the death penalty.¹⁶

¹⁵For example, in a recent survey of the reasons for capital charging in Georgia, "[o]ne prosecutor even acknowledged that he charges capital murder specifically to obtain a more conviction-prone jury through Witherspoon qualification." Bentele, The Death Penalty in Georgia: Still Arbitrary, 62 Wash. U. L. Q. 573, 620 (1985) (footnote omitted). Similarly, in his seminal article on death qualification, Professor Walter Oberer quoted an experienced ex-prosecutor to the effect that with death qualification "the necessity of the Commonwealth proving guilt beyond a reasonable doubt is virtually abolished." Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Texas L. R. 545, 566 (1961).

¹⁶This abuse was raised on appeal and in a certiorari petition to this Court in People v. Miller, 245 Cal.App. 112, 53 Cal.Rptr. 720

The common knowledge of practitioners about their own field of practice is usually accurate. Nonetheless, common knowledge may not be an adequate basis for a constitutional ruling, as this Court concluded in Witherspoon. Since

(1966) cert. granted on other issues, 389 U.S. 968, cert. dismissed as improvidently granted, 392 U.S. 616 (1967). In Miller the prosecutor insisted, over objection, on death-qualifying the jury, and then, after he obtained a first degree murder conviction, he proceeded to submit the question of penalty to the judge without asking for a death sentence -- which came as no surprise, since the defendant was a pregnant woman. Id., cert. pet. at 28. It is impossible to estimate the frequency of this practice from reported cases, since it is rarely so blatant as to present an issue on appeal, and in those cases in which defendants have complained about patent abuses the courts have rejected their claims, see Nettles v. State, 409 So.2d. 85 (Fla.App. 1982) (prosecutor death-qualified jury, then announced during closing argument that he would not seek death penalty); Hicks v. State, 414 So.2d. 1137 (Fla.App. 1982) (prosecutor death qualified jury, then waived death penalty at close of evidence); State v. Strickland, 609 S.W.2d. 392 (Mo. 1980) (prosecutor death-qualified jury, then waived death penalty immediately upon conviction). This pattern of prosecutorial actions is occasionally noted in a case in which it is not an issue, e.g., State v. Mercer, 618 S.W.2d. 1, 17 n. 2 (Mo. 1981) (Seiler J., dissenting) (commenting on

Witherspoon, however, matters have changed: Our common-sense intuition has been supplemented by an abundance of systematic scientific knowledge.

B. The Record and the Findings.

The factual findings of the two courts below can be summarized as follows:

(1) A substantial portion of jury-eligible citizens in this country -- 11%

actions of prosecutors in State v. Strickland, supra, and State v. Hall, 612 S.W.2d 782 (Mo. 1981)); People v. Coleman, 38 Cal.3d. 69, 695 P.2d. 189 (1985) (prosecutorial actions described in id. 174 Cal.Rptr. 756)(Cal.App. 1981)); and occasionally a prosecutor will feel compelled to attempt to explain such actions. For example, in Grigsby I the district court noted that at Grigsby's trial

as soon as the prosecutor got a "guilty" verdict he waived the death penalty. Why?...[O]ne could argue that [it was] in order to get a "death qualified" jury, one which he felt would be more likely to convict than a non-death qualified jury.

483 F.Supp. at 1389 n. 24. Thereafter, at the evidentiary hearing now on review, a prosecutor at Grigsby's trial was called and explained that the prosecution had changed its mind on seeking the death penalty during jury deliberations on guilt. RT 1566-71.

to 17% -- can fairly and impartially try guilt or innocence in capital cases, but would not consider voting for the death penalty. (2) Excluding these citizens produces a jury that is more sympathetic to the prosecution at the outset than a non-death-qualified jury would be. (3) The process of questioning and excluding jurors on the basis of attitudes about the death penalty biases the entire jury panel against the defendant on the issue of guilt. (4) Juries that are sifted in this manner underrepresent blacks and women; (5) furthermore, such juries operate less effectively as deliberating bodies. (6) Such juries are more likely to convict than ordinary, fully representative juries.

These findings were based on a comprehensive record. We have done what we can to summarize this record in the Statement of the Case (supra pp. 8-17) and in the Appendix (infra pp. 94-108). We will add only three brief comments:

(1) The studies in the record examine several different aspects of the practice of death qualification: attitudinal differences between death-qualified and excludable jurors; the effects of the process itself; its impact on jury deliberations; the voting behavior of juries. All converge on the same conclusion: Death qualification disadvantages a capital defendant in the determination of guilt.

(2) The social scientific evidence is remarkable for its volume and consistency. Dr. Reid Hastie, who evaluated the entire body of research on death qualification in the district court, explained:

I'm quite impressed by several aspects of ... this set of studies. We note there is a consistent replication across laboratories, across stimulus material, across types of subjects, across ways of putting the question concerning attitudes towards the death penalty and across many other procedural features, consistent replication, relatively various bases for the individual studies all converging on the same conclusion. That's very impressive.

RT 851-52.

(3) The evidence is uncontradicted. No studies were introduced that are inconsistent with these findings.

C. The Standard of Review

Under Rule 52(a) of Federal Rules of Civil Procedure, the district court's extensive findings of fact may not be set aside unless clearly erroneous.

If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, [an appellate court] ... may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

Anderson v. City of Bessemer City, North Carolina, 53 U.S.L.W. 4314, 4317 (1985).

Rule 52(a) applies to ultimate as well as subsidiary facts, Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982), and to factual inferences drawn from documents and undisputed evidence, Anderson, supra, 53 U.S.L.W. at 4317. Where, as here, the trial of an issue is lengthy, and the district court relies on live testimony, an

appellate court should accord even greater deference to the trial court's findings. See Bose Corp. v. Consumers Union of U.S., Inc., 104 S.Ct. 1949, 1959 (1984); Anderson, supra, 53 U.S.L.W. at 4317. This heightened deference is especially appropriate to findings based on expert testimony. Graver Tank & Mfg. Co. v. Linde, 336 U.S. 271, 274 (1949). Furthermore, the court of appeals affirmed the district court's findings. 753 F.2d at 229. This Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Tank, supra, 336 U.S. at 275; see also United States v. Doe, 104 S.Ct. 1237, 1243 (1984).¹⁷

¹⁷The State and its amici argue that the findings of fact made below are not entitled to deference because they are "constitutional facts". This argument ignores a critical distinction. "[W]here the dispute is not so much over the elemental facts as over the constitutional significance attached to them," Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972); see Miller v. Fenton, 54 U.S.L.W. 4022 (U.S.

D. Arkansas' Factual Contentions.

Arkansas makes several attacks on the factual findings below:¹⁸

12/3/85), this Court independently reviews the record to determine whether the evidence supports the constitutional conclusion reached by a lower court. See Bose, supra, 104 S.Ct. at 1964-65. But, in so doing, it accepts the lower court's underlying findings of historical fact, Bose, 104 S.Ct. at 1967 n.31; cf. Sumner v. Mata, 455 U.S. 591, 597 (1982), including the factfinder's resolution of conflicting evidence, Haynes v. Washington, 373 U.S. 503, 515 (1963), and reasonable inferences which the factfinder drew from the evidence. Lyons v. Oklahoma, 322 U.S. 596, 602 (1944); cf. Rushen v. Spain, 464 U.S. 114, 121-22 n.6 (1983).

Whether a particular practice unconstitutionally deprives the defendant of an impartial jury is the kind of mixed question of fact and constitutional law that this Court must independently review. See Irvin v. Dowd, 366 U.S. 717, 723 (1961). But the subsidiary findings that death-qualified juries are more favorable to the prosecution and more prone to convict than ordinary criminal juries involve no application of legal principles; they are purely factual findings, entitled to substantial deference. Patton v. Yount, 104 S.Ct. 2885, 2892 n.12 (1984); Rushen, supra, 464 U.S. at 120-21; Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 298 (1960).

¹⁸The State also argues as a matter of law that there is no standard for evaluating jury neutrality. We address that argument *infra*. PP. 80-82.

1. Studies of simulated juries. The State argues that the lower courts erred in using studies of simulated juries to reach conclusions about real juries. State's Br. at 43-44. This argument fails. (a) It overlooks the obvious implication of the major pattern in the simulation studies: the closer the approach to reality, the stronger the effects of death qualification. (b) It ignores the scientific surveys which assess the attitudes of actual venirepersons, and the studies which examine the process of death qualification and its effects on jury deliberations. (c) It distorts the record by an inexplicable omission. One of the major studies of the conviction-proneness of death-qualified juries is the Zeisel study (see infra, App. at p. 100), which examined the votes of actual jurors in real felony trials. The State never mentions the Zeisel study.

2. Identification of the death-

penalty groups. The State argues that the questions used in the studies to identify Witherspoon-excludable and death-qualified jurors were inadequate. State's Br. at 44-45. This argument has no support whatever in the record. (a) The more recent studies carefully and accurately distinguish the categories of jurors defined by Witherspoon, as the lower courts found. See, e.g., 569 F. Supp. at 1299. (b) The entire set of studies in the record demonstrates that the relationship between beliefs about capital punishment and prosecution-proneness stretches across the whole range of death-penalty attitudes: the stronger a person's endorsement of capital punishment, the more likely he is to favor the prosecution on other issues as well. This means that the exact legal standard for death qualification has no particular implications for this factual issue: wherever the line is drawn, the exclusion of those on the side of opposi-

tion to capital punishment hurts the defendant in the determination of guilt or innocence.

The State also claims that the decision in Wainwright v. Witt, 105 S.Ct. 844 (1985), somehow supports this argument. Even disregarding the fact that Witt has no direct application to this case (see infra, p. 71), the State's argument makes no sense. The courts below found, on an unassailable record, (a) that a sizeable group of jurors who could fairly and impartially decide guilt or innocence in a capital case are excludable under Witherspoon because they would never consider voting for the death penalty, and (b) that these exclusions tilt the jury against the defendant on the issue of guilt. Whatever else its effects, the plain implication of Witt is that all potential jurors excludable under Witherspoon will still be excluded, plus (perhaps) some additional opponents of

capital punishment. Thus, under Witt, the problems identified here will be, if anything, worse.

3. The relevance of juror behavior. The State argues that both lower courts erred in considering studies that compare death-qualified and excludable jurors rather than juries. State's Br. at 45-46. This argument obscures the distinction between issues and evidence. The issue in this case, as the courts below recognized, is whether death-qualified juries are less representative and more conviction-prone than ordinary criminal juries "selected without regard for their death penalty attitudes." Grigsby I, 637 F.2d at 527. As the courts below found, the studies that "focus on particular groups of jurors do[] give insight into the difference between a death-qualified jury and a normal criminal jury..." 758 F.2d at 236. In addition, these courts relied on a "study [which] did compare death-qualified

with nondeath-qualified panels," id. at 236, and on another study showing that death-qualification reduces the effectiveness of jury deliberations (see infra, App. p. 104).

4. The exclusion of ADPs. The State similarly argues that the courts below failed to take account of the exclusion of ADP jurors in selecting capital trial juries. The record and findings below are to the contrary. This issue was explored at length at the evidentiary hearing, and both lower courts found, based on uncontradicted evidence, that the number of ADP's "in Arkansas and nationwide is negligible when compared to the number of those who would never under any circumstances vote for the death penalty." 569 F. Supp. at 1308; see also 758 F.2d at 238. See supra p. 17 ; infra App. p. 106. Cf. Adams v. Texas, 448 U.S. 38, 49 (1980) ("[I]t is undeniable, and the State does not seriously dispute, that such

[ADP] jurors will be few indeed as compared with those excluded because of scruples against capital punishment)."

5. The value of social science. Finally, the State launches a broadside attack on social science in general, and argues that the evidence in the record is insufficient to prove anything. State's Br. at 46-50. This argument has several strands:

(a) The State takes on entire disciplines: The psychological and sociological studies in the record are "pseudo-scientific," State's Br. at 46-47; "Proof is simply beyond the capacities of empirical social science," id. at 47, quoting Passel, The Deterrent Effect of the Death Penalty: A Statistical Test, 28 Stan. L. Rev. 61, 79 (1975-76).

What is the basis for this extreme position? Certainly not Professor Passel, who is quoted so out of context as utterly

to obscure his meaning.¹⁹ He was writing exclusively about the social scientific evidence on the deterrent effect of

¹⁹The sentence quoted by the State is part of Professor Passel's discussion of research on the deterrent effect of capital punishment, and is limited to that research. Here is the relevant passage: "Just how the evidence presented here should influence one's view on the issue of capital punishment deterrence depends in part on one's perspective. It cannot be proved that executions do not serve as a deterrent to murder. Proof is simply beyond the capacities of empirical social science." 28 Stan. L. Rev. at 79 (emphasis added). It is disingenuous to argue from this that Professor Passel, an eminent econometrician, supports the State's assertion that social scientific evidence in general "is simply not tantamount to 'proof'" State's Br. at 47.

Unfortunately, the incident is but one of several in which the State quotes scholars out of context or otherwise distorts their positions. For example, at page 49 n.27 of its Brief, the State quotes from Tanke & Tanke, Getting Off the Slippery Slope. Social Science in the Judicial Process, 34 Am. Psych. 1130, 1138 (1979): "Few persons, social scientists included, would be content to have fundamental constitutional liberties turn on the results of the latest experimental study." The State implies that these authors would condemn the evidence in the record here. In fact, the Tanke & Tanke article is aimed at suggesting "ways in which social scientists can form more creative partnerships with lawyers to produce accurate, timely, and relevant data for use in judicial

capital punishment. At most, the State establishes here that many social scientists find the empirical evidence on that issue insufficient to prove a claim one way or the other; and in any event, that such evidence is difficult to evaluate. Yet the salient fact about the literature on the deterrent effect of the death penalty is precisely that the rele-

decisions." *Id.* at 1130. It advocates exactly what was done here: studies carefully tailored to the legal issue under consideration, presented at the trial court level. Similarly, the State cites another extra-record source, Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan. L. Rev. 1245 (1974), in purported support of its criticism of the surveys in this record. State's Br. at 42 n.20; *id.* at 50. In fact, Vidmar & Ellsworth are critical of several surveys -- not involved in this case -- for a specific reason that is totally irrelevant here (that these surveys do not tell us why people favor or oppose the death penalty, or precisely what they want). 26 Stan. L. Rev. at 1247, 1268-69. The State neglects to mention the only relevant aspect of their article: the fact that Vidmar & Ellsworth comment directly and favorably on the early death-qualification studies which are in evidence here. "Some of the research has shown a direct link between expressed attitudes favorable to the death penalty and tendency to convict...." *Id.* at 1260 n.72.

vant studies reach opposing and confusing conclusions; the salient fact about the literature on death qualification is that it uniformly and unambiguously supports McCree's contentions, without a single exception.

(b) The State makes the equally undiscriminating argument that some jurists have criticized some uses of social scientific evidence in other cases, e.g., Ballew v. Georgia, 435 U.S. 223, 246 (1978) (Powell, J., concurring). But the criticism there is singularly inapplicable here: it focused on the need for careful exposition of the methodology and findings of the studies, and on the advantages of presenting them at the trial court level. Id. at 246. See also Tanke & Tanke, supra, at 1137-38. The record in this case fully satisfied both of those concerns.²⁰

²⁰The State also cites Gregg v. Georgia, 428 U.S. 153, 184-85 (1976) (plurality opinion); id.

(c) The State argues that "The only level of proof offered was that of statistical significance.... That is the 'lowest form of proof'...." Cert. Pet. at 22. McCree, it says, falsely assumes "that statistical significance has any probative value in the legal sense."

State's Br. at 47. Both this argument and

at 233-36 (Marshall, J., dissenting); and Roberts v. Louisiana, 428 U.S. 325, 354-55 & n.7 (White, J., dissenting). All of these comments are addressed to the fact that on another issue (the deterrent effect of capital punishment) there is a dispute in the social scientific literature. But the literature on death-qualification is conspicuous for its lack of any dispute. Finally, the State extracts a quotation from McCleskey v. Kemp, 753 F.2d 877, 887-88 (11th Cir. 1985), in which the Eleventh Circuit listed issues for its consideration in evaluating a very different body of social scientific evidence (a study of discrimination in sentencing in one state). However, to the extent that McCleskey has any relevance here, it does not support the State's argument: The State neglects to mention that the Eleventh Circuit expressly "take[s] a position that social science research does play a role in judicial decisionmaking...." Id. at 888. Specifically, "the inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances [of the process under scrutiny]." Id. at 890.

its premises are incorrect. Statistical significance has quite a bit of probative value in legal proceedings. Castaneda v. Partida, 430 U.S. 483, 496 n.17 (1977); Hazelwood School District v. United States, 433 U.S. 299, 311 n.17 (1977). Here, McCree's expert witnesses discussed both the meaning of the concept of statistical significance, and its limitations. In essence, they said that it is one important fact among several to consider in evaluating the results of a study: its presence is not a guarantee of truth, and its absence is not necessarily a fatal flaw. See RT 734-738 (Dr. Reid Hastie); RT 100-104 (Dr. Craig Haney). Neither the witnesses nor the courts below based their conclusions solely, or even primarily, on the statistical significance of the findings of the studies they considered, but rather on the quality of these studies, on their consistency, and on the complete regularity with which the same findings have been replicated by different

researchers using different methodologies over a period of many years. See, e.g., supra p. 34 (quoting Dr. Hastie); 758 F.2d at 237. 238. As the Eighth Circuit found:

All the studies introduced were consistent in their conclusions that death penalty attitudes are related to criminal justice attitudes and conviction proneness. Arkansas introduced no contrary studies. The consistency over a wide range of survey methods and respondents is impressive. The state's attack is not well founded.

758 F.2d at 237.

E. The Factual Contentions of Amici Curiae.

Amici curiae the states of Alabama, et al., make a number of objections to the evidence in the record; we have space to address only the major ones.

(1) Amici argue in their Brief in Support of the Petition for Certiorari, at p. 7, that the courts below erroneously assumed that the category at issue was the entire group of Witherspoon-excludable venirepersons, rather than those

excludables who would be fair and impartial on guilt or innocence. Amici repeat this criticism several times in their brief on the merits. Alabama Amicus Br. at 3, 14-15, 26-27. The argument reveals an unfortunate ignorance not only of the record but also of the published opinions that are here on review. In fact, the district and circuit courts relied on several recent studies that carefully identify those potential jurors who could be fair on the issue of guilt but would not consider voting for capital punishment.²¹ Their factual findings explicitly address the precise issue that amici fault them for missing.²²

²¹E.g., Ellsworth/Fitzgerald, see infra, App. at p. 96 ; Precision Research, see infra, App. at p. 98 ; Ellsworth/Thompson/Cowan, see infra, App. at p. 102 .

²²See, e.g., 569 F. Supp. at 1291 ("It is, of course, agreed by all that 'nullifiers' [who cannot be fair on guilt] are properly excluded from both the guilt/innocence phase and the sentencing phase of a capital case. But it is urged that no proper reason exists for the exclusion of impartial WE's at the

(2) Amici, like the State, quote freely from the works of scholars who did not participate in this case and were addressing other issues; like the State, amici distort their statements. The most egregious example is offered in support of amici's argument that proof of guilt is harder in capital than in non-capital cases.²³ Amici cite H. Kalven & H. Zeisel, THE AMERICAN JURY 443 n.18 (1966) as "documenting jury acceptance in ordinary homicide cases of theories of proof, such as guilt/innocence phase"); id. at 1294 ("[W]hereas only 8% of Arkansas men would be Witherspoon Excludable (after removing 'nullifiers'), 13% of Arkansas women would fall into that category."); 758 F.2d at 226 ("Respondents who could not be fair and impartial, i.e., nullifiers, were excluded. Of the remaining 717 subjects, over seventeen percent were found to be WE's.").

²³The record on this point is described as "testimony of attorneys experienced in capital trials." Alabama Amicus Br. at 25. To be more exact, it consists of statements by one Arkansas state prosecutor who was called as a witness by the State of Arkansas. Other prosecutors clearly do not share this view, as evidenced by their practice of asking for the death penalty for the purpose of increasing their chances of obtaining a conviction. See supra, p.30.

as felony-murder, that juries reject in capital cases." Alabama Amicus Br. at 25 n.23. In fact, the text of Kalven & Zeisel says the exact opposite. It reports that juries did not hesitate to convict in capital felony-murder cases but, following conviction, they "rebel[led] at imposing the death penalty for the vicarious criminal responsibility of the defendant." Kalven & Zeisel, supra at 443, and id. n.18. Cf. Enmund v. Florida, 458 U.S. 782 (1982).

F. Summary.

In Witherspoon the Court defined the factual question at issue: Does death qualification produce "an unrepresentative jury on the issue of guilt or substantially increase[] the risk of conviction"? 391 U.S. at 518. If so, the resulting jury is "less than neutral with respect to guilt." Id. at 520 n.18 (emphasis in the original). The evidence on this point in 1968 was insufficient:

The studies were "tentative and fragmentary," id. at 517, and, since they had never been presented in a trial court, the record was "almost totally lacking in the sort of factual information that would assist the Court." Id. at 518 n.11. All that has now changed.

Since Witherspoon the number of studies on death qualification has grown dramatically, and they are all consistent. More important, the scientific literature on this issue has changed in kind as well as quantity. The entire body of research has now been presented in evidence several times, and no court has doubted what it proves. Two courts have held that the factual evidence is immaterial to the constitutionality of death-qualified juries -- Smith v. Balckom, 660 F.2d 573 (5th Cir. 1981); Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), cert. pending (see infra, pp.80-82) -- but the courts that actually considered

the evidence have all concluded that death-qualification biases juries against capital defendants on the issue of guilt. Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301 (1980) (but noting the absence from that case of data on ADP's); Keeten v. Garrison, 578 F. Supp. 1164 (W.D. N.C.), rev'd on other grounds, 742 F.2d 129 (4th Cir. 1984); Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), aff'd, 758 F.2d 226 (8th Cir. 1985).²⁴ The factual findings of the district court and of the circuit court that death-qualified juries are less than neutral on guilt are not only consistent with the extensive and detailed evidence; they are not merely in accord with the weight of the evidence; they are compelled by an overwhelming and uncontroverted record.

²⁴The Alabama Amicus Br., at 24 n.22, is wrong when it says there are contrary factual findings in Spinkellink, or elsewhere.

III. THE NON-NEUTRALITY OF DEATH-QUALIFIED JURIES VIOLATES A CAPITAL DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY AT THE TRIAL OF GUILT OR INNOCENCE.

The legal issue in this case was also clearly identified in Witherspoon: Once it has been established that death-qualified juries are not neutral on guilt, the question arises

whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence -- given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.

391 U.S. at 520 n.18. The difference in the parties' answers to this question is stark. The State asserts in its lead argument for reversal that its interests in a unitary jury outweigh "any infringement on a defendant's rights." State's Br. at 9; see id. at 8-19. McCree, by contrast, submits that no legitimate interest of the state in using a single

jury to try both guilt and punishment can outweigh the right to a fair trial of guilt on capital charges.

A. The Right to a Fair and Impartial Jury.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury" Even before Duncan v. Louisiana, 391 U.S. 145 (1968), incorporated the Sixth Amendment's jury-trial right into the Fourteenth, it had long been settled that due process assures every criminal defendant a trial before an impartial tribunal. "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). See, e.g., Taylor v. Hayes, 418 U.S. 488, 501 (1974) (citing authorities); Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (per curiam). The right to a fair and impartial jury, however, is more powerful and specific. See Duncan, supra, 391 U.S. at 148-58.

A defendant in a bench trial is entitled to a disinterested judge, but that is all he can demand of the composition of the court. A jury is different. It provides a "common-sense judgment," as opposed to the "more tutored" approach of the judge. Duncan, supra, 391 U.S. at 156. Its "common-sense judgment" is "the common sense of the community," Ballew v. Georgia, 435 U.S. 223, 232 (1970), a judgment based on "community participation and shared responsibility that results from that group's determination of guilt or innocence." Williams v. Florida, 399 U.S. 78, 100 (1970). This is why it is a "part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (1940). A jury is a special type of tribunal, embodying a broad democratic ideal, see Glasser v. United States, 315 U.S. 60, 85 (1942); "and the constitution

of juries is a very essential part of the protection such a mode of trial is intended to secure." Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

The process of jury selection is therefore critical to the jury's neutrality. "[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group. . . ." Glasser, supra, 315 U.S. at 86. To select a jury by procedures that systematically bias it as compared with the community from which it was drawn is to empanel a jury that is not "impartial" in the constitutional sense. See Wither- spoon, supra, 391 U.S. at 519-21; cf. Ballard v. United States, 329 U.S. 187, 193-95 (1946); and see infra pp. 82-85.

Death qualification does just this, in several ways that "threaten[] the fairness of the proceeding and the proper

role of the jury," Burch v. Louisiana, 441 U.S. 130, 138 (1979):

(1) By its very nature, death qualification narrows the spectrum of views on a jury. It excludes entirely a sizeable group of impartial venirepersons with distinctive beliefs concerning the death penalty; and, since such beliefs are closely tied to other legitimate perspectives upon criminal justice, it restricts the reflection of those perspectives on the jury. As a result, death qualification undermines the interplay of opinions in the jury room, "the counterbalancing of various biases [that] is critical to the accurate application of the common sense of the community to the facts of any given case." Ballew, supra, 435 U.S. at 234. In addition, death qualification inhibits "effective group deliberation," id. at 232, by producing a jury that scrutinizes the testimony of all witnesses less critically, and by reducing its

collective memory of the facts. 758 F.2d at 234. In short, death qualification lowers the quality of the jury as a deliberating body. See also Brown v. Louisiana, 447 U.S. 323, 330-33 (1980) (plurality opinion).

(2) The process of death qualification inclines jurors to believe that the defendant is guilty before they have heard evidence in court.²⁵ Cf. Parker v.

²⁵The State asserts that the Eighth Circuit "specifically declined to pass on the issue of the prejudicial nature of the voir dire procedure itself," State's Br. at 18, and that "[t]he issue before the Court relates only to exclusions for cause resulting from the death qualification process." Id. at 18 n.7. These statements are neither apt nor accurate. A relevant finding made by the district court would not be unavailable to this Court simply because the circuit court did not explicitly pass on it, even if that were the case. In fact, however, it is not the case. The Eighth Circuit did decline to assess the impact of the process of death qualifying voir dire on the remedy for the constitutional problem it identified. 758 F.2d at 243, citing Hovey, supra, 28 Cal.3d at 70-73, 616 P.2d at 1347-50. But the Eighth Circuit explicitly discussed the evidence on the biasing effects of death-qualifying voir dire, 758 F.2d at 234, and the testimony of the witness who presented it, id. at 235, in support of its finding that death

Gladden, 385 U.S. 363 (1966). It thus entails "dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt," Estelle v. Williams, 425 U.S. 501, 503 (1976). The problem here bears some resemblance to the problem of an inclination to convict arising from jurors' exposure to pretrial publicity. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966); Patton v. Yount, 104 S.Ct. 2885 (1984). But unlike the latter problem, this one arises entirely from communications to the jurors which are within the court's control; here, there are no "conflicts between the right to an unbiased jury and the guarantee of freedom of the press," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976); hence, there is no need to tolerate "some possibility of an injustice unredressed," id. at 555. The possibility

qualification biases juries against capital defendants on guilt.

can be curbed, if death qualification is.

(3) Finally, and most important, death qualification produces a partial jury, in two separate ways. First, a death-qualified jury is partial in its predisposition. It is a jury that is more disposed than others, at the very outset of the trial, to side with the prosecution. The Court has long held that any procedure which would tend to predispose a criminal tribunal to convict violates due process. Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Monroeville, 409 U.S. 57 (1972); cf. Connally v. Georgia, 429 U.S. 245, 246 (1977). This is so in part because "our system of law has always endeavored to prevent even the possibility of unfairness." In re Murchison, 349 U.S. 133, 136 (1955). Such a possibility requires "courts [to]. . . take strong measures to ensure that the balance is never weighted against the accused." Sheppard v. Maxwell, supra, 384 U.S. at

362; see also Nebraska Press Ass'n, supra, 427 U.S. at 551-55. Yet death qualification weights the predispositional balance of the jury against the accused by restricting service to a group of jurors that is uncommonly sympathetic to the prosecution on the question of guilt or innocence.

Second, a death-qualified jury is partial in its performance. Faced with the identical case, a death-qualified jury is more likely to vote to convict, or to convict of a higher crime, than a jury that represents the entire community of fair and impartial citizens. The representative function of the jury is usually discussed in the context of the fair-cross section requirement of the Sixth Amendment (see infra, pp.32-89), but not because it is irrelevant to impartiality. On the contrary, it is central to impartiality, but in a manner that is rarely violated: death

qualification appears to be the only example of a general exclusionary practice that is known systematically to alter criminal jury verdicts to the detriment of one side. Not surprisingly, the major case on this issue is Witherspoon, where the Court (on the meager record before it) declined to decide whether death qualification "results in an unrepresentative jury on the issue of guilt." 391 U.S. at 518. But the Court did hold that Witherspoon's jury was, by comparison to the entire community, "uncommonly willing to condemn a man to die," id. at 521 (footnote omitted), and that a jury so inclined "fell woefully short of that impartiality to which petitioner was entitled under the Sixth and Fourteenth Amendments." Id. at 518. No less can be said of a jury that is uncommonly willing to convict a man on capital charges.²⁶

²⁶In Beck v. Alabama, 447 U.S. 625 (1980),

B. The Arguments in Opposition.

1. The "bias" of death-qualified jurors. The State argues that "[t]he Eighth Circuit improperly imputed bias to all death-qualified jurors." State's Br. at 22; see also id. at 28; Cert. Pet. at 20. This argument reflects a thorough misunderstanding of McCree's claims and of the opinions below; it overlooks the critical distinction between jurors and juries.

A juror is fair and impartial if he can base his decision solely on the evidence and the law. But different fair and impartial jurors may reach opposing decisions; that is a common occurrence.

this Court expressly held that the higher standard of procedural fairness required at the penalty phase of the capital trials extends to the guilt-or-innocence phase as well: "To ensure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." Id. at 638 (emphasis added).

The genius of the system of trial by jury is that it relies on the wisdom of a group chosen from the community, the jury. That group must not only consist of fair and impartial individuals; it must also be a fair and impartial jury in its capacity to represent the community in which the trial takes place. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Williams v. Florida, 399 U.S. 78 (1975); Peters v. Kiff, 407 U.S. 493 (1972); Ballard v. United States, 329 U.S. 187 (1946); Smith v. Texas, 311 U.S. 128 (1940); Strauder v. West Virginia, 100 U.S. 303 (1880).

To choose a common example, it is quite possible that white and black jurors will evaluate certain types of evidence differently. White jurors might be more skeptical, for instance, of a defendant's claim that a police officer struck him without justification. This is a legitimate difference in point of view:

both the white and black venirepersons may be fair and impartial as jurors, individually. Nonetheless, the disposition of the jury on this issue could determine the outcome of the case. To say in this instance that a jury from which blacks were excluded was prosecution-prone does not imply a criticism of the point of view of the whites, or embody a judgment that the defendant's contention is factually correct. The rule is simply that neither of these legitimate points of view may be systematically culled from the jury. That is the result sought by McCree and ordered by the courts below.

In the same vein, the State argues that McCree's proper remedy is to rely on "demonstrable prejudice found in the voir dire...." State's Br. at 24. In support of this argument, the State cites a number of cases in which this Court and others demanded that a claim of juror bias be

clearly and specifically established, or refused to impute bias to jurors on the basis of a group characteristic. E.g., Dennis v. United States, 339 U.S. 169 (1949); Smith v. Phillips, 455 U.S. 209 (1982); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976). The argument is misplaced. McCree does not claim that death-qualified jurors are biased as individuals, and he does not seek to exclude them from any jury; he seeks rather to stop the systematic exclusion of other fair and impartial jurors whom death qualification removes.²⁷

²⁷The State also cites the rule that state trial-court determinations of bias or impartiality are entitled to a presumption of correctness under 28 U.S.C. sec. 2254(d), Witt, supra, 105 S.Ct. at 854; Patton v. Yount, supra, 104 S.Ct. at 2891; but this rule is simply irrelevant. McCree does not argue that trial courts incorrectly identify jurors who cannot fairly determine penalty, but rather that the exclusion of such jurors from the jury that determines guilt or innocence is legally impermissible. The jurors whose exclusion he contests were not found by the trial court to be incapable of sitting fairly on the issue of guilt; neither he nor the courts below encompassed any such juror within the issues presented by this case.

2. The risk of partiality on guilt.
The State seems at points to argue that jurors who state that they would not consider voting for the death penalty in any case cannot be trusted to be fair and impartial in deciding guilt or innocence in a capital case, even though they may state under oath that they will be fair and impartial on that issue. It quotes at length from Spinkellink v. Wainwright, 578 F.2d 582, 595-96 (5th Cir. 1978), in which this argument is made. State's Br. at 13; Cert. Pet. at 17. But later, the State backs away from any such claim: "It is unnecessary for the State to contend that WEs are unable to sit fairly in the guilt phase." State's Br. at 37 n.15. The disclaimer is understandable, for two reasons.

First, this is an argument that has no boundaries. It calls for excluding all opponents of the death penalty from capital cases on the ground that some of

them may deceive the court, either intentionally or unintentionally, about their ability to be fair and impartial and to consider voting for death.

Witherspoon, Adams, and Witt alike foreclose this result, and the logic that leads to it.

Second, as the State itself argues, exclusions for bias may not be based on "the imputation of bias to jurors as a group," State's Br. at 28, citing Dennis v. United States, 339 U.S. 162 (1949); United States v. Wood, 299 U.S. 123 (1936). This is so especially when the substitution of sweeping assumptions for individualized inquiry into jurors' qualifications would exclude "broad categories of persons from jury service." Duren, supra, 439 U.S. at 370; see also Taylor, supra, 419 U.S. at 533-35. A party seeking to exclude a juror for partiality has "the burden of establishing prejudice... [and] such prejudice ha[s] to

be a demonstrable reality, not speculation...." State's Br. at 25, citing U.S. v. Haldeman, supra. It follows that jurors who oppose the death penalty cannot be excluded on the basis of a blanket assumption that they may not be fair triers of guilt or innocence.

The State also claims that the entire issue in this case was eliminated by Wainwright v. Witt, supra, following which "there is no legal distinction between the ability to perform one's duties as a juror in the guilt phase and the ability to do so in the penalty phase." State's Br. at 30. This argument misses the mark for two distinct reasons. First, McCree's trial occurred in May 1978, long before Witt. At that time, death qualification was governed by Witherspoon, and, as the State recognizes, McCree's jury was "qualified in accordance with Witherspoon." State's Br. at 3. Whatever impact Witt may have on the impartiality of death-qualified

juries, McCree was not touched by it, factually or legally.

Second, even for cases that are governed by it, Witt does not have the effect the State attributes to it. Witt holds that jury neutrality is not compromised by excluding jurors whose views "would prevent or substantially impair" the performance of their duties. 105 S.Ct. at 852. Through this standard, "[t]he [Witherspoon] tests with respect to sentence and guilt, originally in two prongs, have been merged..." Id. at 851. The State completely misreads this latter phrase. To say that the same test is used in regard to both issues at a capital trial does not mean that the same jurors are excluded by it in connection with the two issues. In most states a single test -- the ability to judge the facts and follow the law impartially -- governs exclusions for actual bias from all non-capital juries. But that hardly means

that the same jurors would be excluded from a rape case as from a drug case, from a well-publicized murder trial and from an obscure petty theft trial. It certainly does not mean that "there is no legal distinction between the ability to perform one's duties as a juror" where two distinctly different duties are involved. State's Br. at 30.

After Witt as before it, capital trial jurors must decide guilt first and penalty second. Arkansas seeks to exclude jurors from the determination of guilt although they could be fair and impartial on that issue, simply because they are unqualified to determine penalty. Witt neither produces nor justifies that result. Indeed, if there is any relevant lesson to draw from Witt, it is that trial judges are amply empowered and can be trusted to do precisely what McCree urges that they should do: to discern and exclude those jurors who will not be

impartial at the task of judging guilt when guilt is in question, and those who will not be impartial at determining penalty when penalty is the issue. Witt, supra, 105 S.Ct. at 852-53.

3. State interests. But the State's major argument for reversal is that the State's interests in using a single jury at both phases of capital trials justify its use of death-qualified juries whether or not such juries are fair and impartial triers of guilt. State's Br. at 8-19. Time and again the State reiterates that its "real and articulated interests" justify this practice, State's Br. at 19, but nowhere are these interests clearly expressed.²⁸ The State thus encounters the two-fold difficulty that "[t]he right

²⁸One negative point seems clear: the State does not argue that interests of efficiency and money justify death qualification at the guilt phase. Cf. Ballew v. Georgia, supra, 435 U.S. at 243-45 (rejecting proffered justifications of expense and time); Burch v. Louisiana, supra, 441 U.S. at 139; Tumey v. Ohio, supra, 273 U.S. at 523-24. Nor could the State plausibly make this

to a proper jury cannot be overcome on merely rational grounds," Taylor, supra, 419 U.S. at 534; see also Duren, supra, 439 U.S. at 367-68, and that the grounds asserted here are of dubious rationality at best. To the extent that they can be disentangled, they seem to be the following:

(a) The State seems to claim that it has an interest in avoiding the risk that jurors who are unqualified to impose the death penalty will be partial on guilt, despite their sworn statements to the

argument if it wished. The Eighth Circuit suggested (but did not order) two remedies for the problems of death qualification, both based on using alternates to substitute for excludable jurors at the penalty phase; it noted that "[n]either procedure should significantly affect the cost or efficiency of the trial." 758 F.2d at 243.

Amici curiae the State of Alabama, et al., argue at length that the Eighth Circuit's holding will complicate voir dire in capital cases. Alabama Amicus Br. at 16-23. This is precisely wrong. The Eighth Circuit's holding will simplify capital voir dire by removing the issue of penalty from the questioning prior to the guilt phase, and leaving it to be addressed (if at all) prior to the penalty phase, when it is directly relevant.

contrary. State's Br. at 13. We have already addressed this argument, supra pp. 69-74; as we have noted, it is neither sustainable nor even clearly endorsed by the State.

(b) The State argues that the defendant has an interest in having the same jury determine guilt and penalty, since under that system "whimsical doubts" about his guilt may produce a penalty less than death, whereas, if the responsibility for these two decisions is divided, the influence of such doubts may diminish. State's Br. at 14, citing Grigsby, 758 F.2d at 247-48 (Gibson, J., dissenting). In other words, a practice that infringes on a defendant's right to a fair trial on guilt in a capital case is acceptable because, if he is convicted of a capital crime, it might reduce his chances of being sentenced to death. The short answer to this argument is that any such possibility is irrelevant: it is no reply

to a defendant who claims that his capital conviction was the product of jury bias to say "That's Okay; after all, your punishment might be less than death." In addition: (i) there is no evidence that "whimsical doubts", if they ever occur, do in fact have this effect; and (ii) at least some courts have explicitly held that lingering doubts about guilt are not a legitimate basis for rejecting the death penalty. E.g., Buford v. State, 403 S.2d 943, 953 (Fla. 1981) ("A convicted defendant cannot be 'a little bit guilty.'"); Burr v. State, 466 S.2d 1051, 1054 (Fla. 1985) (same).

(c) Finally, the State argues that it has an interest in using the same jury to determine guilt and penalty because that practice is traditional, "The unitary jury system has always been the law in Arkansas...", State's Br. at 14, and because determinations of guilt and punishment are "necessarily interwoven"

id., quoting Rector v. State, 659 S.W.2d 168, 173 (Ark. 1983). This argument has no independent substance. Other than the interests we have already discussed, the State advances no reasons for this "tradition" and no justification for the conclusion that, under a bifurcated capital-trial procedure, guilt and penalty determinations are "necessarily" interwoven.

In any event, the State's argument on this point is undermined by its own practice. Under Ark. Crim. Code 41-1358 (Supp. 1985), a defendant whose death sentence only is reversed on appeal may be resentenced on remand by a jury that will not pass on guilt. The State's interest in a unitary jury determination of guilt and penalty may, it seems, be subordinated to other interests of the State (although not to "the defendant's interest in a completely fair determination of guilt or innocence," Witherspoon, supra, 391 U.S.

at 520 n.18): Section 3 of the 1983 Act embodying this provision found that "it is a waste of judicial resources to require the retrying of an error-free trial if the State wishes to seek to reimpose the death penalty; and this Act is immediately necessary to rectify that problem."²⁹

²⁹This provision was passed in 1983, but explicitly provides that it "shall apply retroactively to any defendant sentenced to death after January 1, 1974." Ark. Crim. Code 41-1358(e). The enacting legislation also contains a conspicuously post litem motam declaration -- having no evident operational consequence -- that "[t]his Act shall not be construed to amend [the earlier legislation] ... requiring the same jury to sit in both the guilt and sentencing phases of the original trial." Ark. Crim. Code 41-1358(f).

It is worth noting that several states have statutory schemes that can readily accommodate the substitution of death-qualified jurors at the penalty phase of capital trials. Thirteen states have provisions for impanelling a second jury at the penalty phase. Ala. Code sec. 13A-5-46(b)(Repl. 1982); Cal. Penal Code sec. 190.4(c)(Deering 1985); Conn. Gen. Stat. Ann. sec. 53a-46a(b)(2)(C)(1985); Del. Code Ann. title 11, sec. 4209(b)(1)(Rev. 1977); Fla. Stat. Ann. sec. 921.141(1)(West 1985); Ill. Ann. Stat. ch. 38, sec. 9-1(d)(2)(C)(Supp. 1985); La. Code Crim. Proc. art. 905.1(B)(West 1984); Md. Code Ann. art. 27, sec. 413(b)(2)(iii)(Repl. 1982); Miss. Code Ann. sec. 99-19-101(1)(Supp. 1985); N.J. Stat. Ann. sec. 2C:11-3(c)(1)(West 1982); State v. Mon-

4. The Meaning of Neutrality. The State quotes the position of the dissent in the Eighth Circuit that "partiality as a legal concept is [not] proven when factually it can be shown that juries with WEs removed are more conviction-prone." State's Br. at 23, quoting 758 F.2d at 248; see also Cert. Pet. at 10. The source of this contention is three cases cited by the State and the dissent:

Curi, 195 N.J. Super. 317, 478 A. 2d 1266 (N.J. Super. 1984); N.C. Gen. Stat. sec. 15A-2000(a)(2) (Repl. 1978); Utah Code Ann. sec. 76-3-207(1) (Supp. 1983); Wyo. Stat. sec. 6-2-102(b)(1977). Six states permit alternates to replace jurors at the sentencing phase. People v. Green, 15 C.A. 3d 524, 93 Cal. Rptr. 84 (Cal. App. 1971) (construing Cal. Penal Code sec. 1089); Colo. Rev. Stat. sec. 16-11-103(a)(1) (Supp. 1985); Del. Code Ann. tit. 11, sec. 4209(b)(1) (Rev. 1977); Fla. R. Crim. P. 3.280(b); Md. Code Ann. art. 27, sec. 413(m)(3)(i) (Supp. 1985); N.C. Gen. Stat. sec. 15A-2000(2) (Repl. 1978). Besides the states listed above, six states allow a large number of alternates to sit in a criminal case, thus providing a mechanism to implement post-guilt death qualification. Ga. Code Ann. sec. 15-12-168 (1982) (unlimited number); N.H. Rev. Stat. Ann. sec. 500-A: 13 (Repl. 1983) (unlimited number); N.M. Stat. Ann. R., Crim. Proc. 39(d)(3)(six); Ohio Crim. R. 24(F) (six); Pa. Crim. R. 1108(a) (unlimited even number); S.D. Codified Laws Ann. sec. 23A-20-28 (Rev. 1979).

Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); and Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). These opinions take the view that, by objecting to death-qualification, capital defendants are seeking a special advantage, a "defendant-prone" jury, Spinkellink, 578 F.2d at 597, "the jury most like to acquit," Smith, 660 F.2d at 579. It does not matter, they say, that death-qualified juries are more likely to convict than non-death-qualified juries since "that does not demonstrate which jury is impartial." Spinkellink, 578 F.2d at 594.

With all due respect, this argument misconceives the issue wholly. McCree does not seek a jury composed only of excludables, or any other special "acquittal prone" jury, but simply an ordinary, fully representative jury on guilt or innocence. "Non-death-qualified"

juries are nothing more or less than the ordinary juries used in all criminal trials except capital trials. Surely those juries set the standard for impartiality. Do the State and the dissent below seriously contend that the prosecution would not have received a fair trial if McCree had been tried for non-capital murder, because his jury would then have been acquittal-prone? The "actual systems" used to administer justice "in the context of the criminal processes maintained by the American States" (Duncan, supra, 391 U.S. at 149-50 n.14) adequately demonstrate the answer to the question "which jury is impartial."

IV. DEATH QUALIFICATION VIOLATES A CAPITAL DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL ON GUILT OR INNOCENCE BY A JURY THAT REFLECTS A FAIR CROSS-SECTION OF THE COMMUNITY.

A. The Representative Cross-Section Requirement

Representativeness, as we have seen, is an essential element of the right to a

trial by jury. Supra, pp. 56-58 and 80-82. It was first articulated in Strauder v. West Virginia, supra, as an aspect of the equal-protection prohibition against racial discrimination; but the equal-protection cases emphasized that the very notion of a jury was "a body that is truly representative of the community." Smith v. Texas, supra, 311 U.S. at 130. See also, e.g., Pierre v. Louisiana, 306 U.S. 354, 358 (1939). The same conception was reflected in cases requiring that federal juries be broadly representative of the community.³⁰

In Taylor, supra, 419 U.S. at 530, the Court held that "the fair-cross-section requirement [is]... fundamental to the jury trial guaranteed by the Sixth Amendment...." This holding was reaffirmed in Duren, supra, which also spelled out the procedure for applying it:

³⁰See Glasser v. United States, 315 U.S. 60 (1942); Theil v. Southern Pacific, 328 U.S. 217 (1946); Ballard v. United States, 329 U.S. 187 (1946).

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury selection process.

439 U.S. at 364.

The Sixth Amendment right to a representative jury is closely linked to the notion of jury impartiality in two ways:

(i) It fosters a diversity of attitudes on the jury in order to provide an "assurance of diffuse impartiality," Theil v.

Southern Pacific, supra, 328 U.S. at 227

(Frankfurter, J., dissenting), without which the jury is deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented," Peters v. Kiff, 407 U.S. 493,

503-04 (1972) (plurality opinion). (ii)

It insures that jury decisions reflect "the common sense of the community," Bal-

lew, supra, 435 U.S. at 232, and are not "imbalanced to the detriment of one side," id. at 236.

B. The Decisions Below

Both the district court and the circuit court held that death qualification violates the Sixth Amendment right to a representative jury. In most respects, their analyses of the issue coincide. Both courts found that Witherspoon-excludables were a sizeable and distinctive group within the community of citizens who could be fair and impartial on guilt in capital cases. 569 F. Supp. at 1285; 758 F. 2d at 231. Both found that this group was not represented on juries at the guilt phase of capital cases because of systematic exclusion. 569 F. Supp. at 1285; 758 F. 2d at 232.

Under the terms of Taylor and Duren, these findings were sufficient to establish a violation of the Sixth

Amendment; no actual prejudice needs to be shown. Duren, supra, 439 U.S. at 368 n.26; Taylor, supra, 419 U.S. at 531-32. Nonetheless, each of the lower courts applied a particularly strict test to this case, and concluded that it was necessary to examine the effects of this exclusionary practice. At this point their opinions diverge somewhat. The district court held that death-qualified juries are unrepresentative because they exclude a group of jurors with distinctive attitudes, and because blacks and women are underrepresented on them. 569 F. Supp. at 1293-94. The circuit court held that death-qualified juries are unrepresentative because they are conviction-prone and therefore likely to reach decisions that do not represent the perspectives of the community from which they are drawn. 758 F. 2d at 229, 232-38.

C. The State's Arguments for Reversal

The State's primary argument on this issue is that its infringement upon capital defendants' rights to a representative jury is justified by its interests in maintaining a unitary jury system in capital cases. This is the same argument we have addressed and refuted above. Supra, pp. 74-79. In addition, the State makes two more formal arguments:

1. Representativeness on petit juries. The State argues that the representative cross-section requirement applies only to the jury pool and not to exclusions from trial juries themselves. State's Br. at 39-40. The ostensible authority for this argument is the undisputed rule that the cross-section requirement does not demand "that petit juries actually chosen must mirror the community," Taylor, supra, 419 U.S.

at 538. But that rule simply means that no defendant can demand that all elements of the community be included on his or her particular jury; it offers no support for a purported state right to remove an entire class of jurors from every capital jury.

The State's argument uses labels to obscure realities. Citizens who will not consider the death penalty are excluded from the pool of prospective jurors available for capital trials; they are, in effect, ineligible for such cases. The fact that this systematic exclusion is accomplished in the courtroom is of no consequence. Consider a State law providing that any venireperson who states on voir dire that he is a Roman Catholic may be excused for cause. In any event, Ballew v. Georgia has now firmly settled the point that the Sixth Amendment's concern for representativeness applies to petit

juries, not merely jury pools. 435 U.S. at 236-37, 241-42; see also Brown v. Louisiana, 447 U.S. 323, 332-33 (1980).³¹

2. The cognizability of the excluded group. The State cites a number of cases in which lower federal courts have declined to recognize groups as "distinctive" or "cognizable", and concludes from them that "while attitudes may be a factor in determining distinctiveness and cognizability, this Court has never held that attitudes alone are sufficient to define such a group." State's Br. at 35. To be sure, this Court has never faced that issue, but for an important reason: No other group of

³¹See also Swain v. Alabama, 380 U.S. 102 (1965), which held that the discriminatory use of preemptory challenges in the selection of a particular petit jury did not violate the equal protection clause, but that the type of practice at issue here -- the systematic removal of every member of a distinctive group from each and every capital jury over an indefinitely long period of time -- would be unconstitutional. Id. at 223-24.

fair and impartial venirepersons is systematically excluded from jury service because of their attitudes or beliefs. If that were to happen -- if a State, for example, excluded all members of the Moral Majority or of the ACLU from jury service, or all conservationists or socialists -- could any court hold that the Sixth Amendment permits this practice?

The basic problem with the State's argument is that it elevates form over substance. Two major goals of the requirement of representativeness are diversity of attitudes on juries and jury decisions that reflect community viewpoints. The concepts of "distinctiveness" and "cognizability" are not ends in themselves but are designed to achieve these goals. In the present case the record and the findings establish that: (i) a sizable category of jurors is entirely excluded from trials on guilt or innocence

in capital cases, despite the fact that they could be impartial in those proceedings, because of their attitudes about the death penalty;³² (ii) this group shares a set of distinctive attitudes on other important issues (a fact the State has not disputed); (iii) blacks and women are disproportionately excluded by this process; and (iv) the remaining group would behave differently as jurors than a cross-section of the community would -- specifically, they are more likely to convict. This is a uniquely strong set of facts; as the courts below found, it establishes a clear viola-

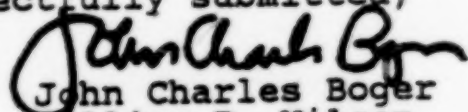
³²The State argues that "the number of WEs in the population is uncertain and dwindling." State's Br. at 35. In fact, the courts below both found that such jurors comprise 11% to 17% of the jury-eligible population, a substantial number. But the point of the State's argument is obscure in any case. Since 1964, the proportion of registered Democrats in the national population has probably declined considerably; does that mean that excluding registered Democrats for cause is more permissible now than twenty years ago?

tion of the Sixth Amendment right to a representative jury.³³

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,


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William R. Wilson
Samuel R. Gross
James S. Liebman
Anthony G. Amsterdam

³³The States of Arizona, et al., amici curiae, argue that the holding of the Eighth Circuit, if upheld, will have drastic consequences: states will have their jury selection practices overturned if it appears that such groups as "'mobile people', non-voters, or the young" are excluded. Brief of Amici Curiae, the States of Arizona, et al. at 11. This fear is unfounded; it ignores the unique aspects of death qualification: (1) No other group is excluded for cause, entirely, in any category of cases, because of its attitudes or beliefs. (2) There is no evidence that other categories of exclusion are particularly prejudicial to the interests of one side; indeed, in every other context the requirement of representativeness has been applied despite the absence of any showing of prejudice. See, e.g., Peters v. Kiff, supra, 407 U.S. at 503-

04 The issue is not simply the absence of studies on other attitudes; there is a good deal of evidence that death-penalty attitudes have a special and central position in the constellation of attitudes on criminal justice issues. Thus, for example, the most comprehensive recent study of jury behavior found that none of the attitudes examined in that study, or in the research it reviewed, were useful predictors of jury behavior, other than death penalty attitudes. Hastie, Penrod & Pennington, Inside the Jury, ch. 7 (1983). Cf. Ellsworth & Ross, Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists 29 Crime & Delinquency 116(1983)(death penalty attitudes have great symbolic importance for most people).

APPENDIX: MAJOR EMPIRICAL STUDIES¹

I. Attitudes and demographic traits.

The record contains four surveys on the attitudinal effects of death-

qualification: (1) Bronson/Denver.² In

¹McCree's exhibits were marked in the district court according to the initials of the witness during whose testimony they were presented in evidence; thus, for example, EB-15 is the fifteenth exhibit presented during the testimony of Dr. Edward Bronson. In some cases more than one witness relied on a particular study or chart; in those instances the exhibit was presented in duplicate, bearing a second exhibit number appropriate to the second witness. Some of the studies presented in the district court were subsequently published in a Special Issue of the journal *Law and Human Behavior* devoted to research on death-qualification (Vol. 8, No. 1/2, June 1984). The Eighth Circuit cited these studies in their published versions; see 758 F.2d at 233-34. In this Appendix, however, we have cited them as they appear in the record, and indicated in each instance that they have been "published in 8 *Law and Human Behavior* [page no.] (1984)."

²Bronson, Edward C., On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 Colo. L. Rev. 1 (1970). Exhibits EB-2 and RH-7 (text) and EB-3 through EB-8, EB-79 and EB-40 (charts); RT 423-449 (testimony of Dr. Bronson); RT 757-758 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1293-94; 758 F.2d at 232; Keeten, 578 F. Supp. at 1172; Hovey, 28 Cal.3d at 43-44, 616 P.2d at 1327-28.

1968-69 Dr. Bronson interviewed 718 Colorado venirepersons and asked: (i) whether they strongly favored, favored, opposed or strongly opposed the death penalty; and (ii) five questions on other criminal justice issues. (2) Bronson/California.³ In 1969-70 Dr. Bronson replicated his Colorado survey using 744 venirepersons from Butte County, California; in 1974-75 he did so again, using 707 venirepersons from Los Angeles. (3) Harris, 1971.⁴ In 1971 the Harris polling organization surveyed a representative sample of 2,068 respondents drawn

³Bronson, Edward C., Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. Rev. 11 (1980). Exhibits EB-9 and RH-8 (text), and EB-11 through EB-26 and EB-81 through EB-84 (charts); RT 463-492 (testimony of Dr. Bronson); RT 758-760 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1293-94; 758 F.2d at 232-33; Keeten, 578 F. Supp. at 1172-73; Hovey, 28 Cal.3d at 47-49, 616 P.2d at 1330-33.

⁴Louis Harris & Associates, Inc., Study No. 2016 (1971). Exhibits CH-17, EB-32 and RH-9 (text) and EB-33 through EB-63, EB-87 and EB-88 (charts);

from the adult population of the United States. Respondents were asked: (i) detailed questions about their death penalty attitudes, including questions based on Witherspoon; and (ii) numerous questions about their attitudes toward the criminal justice system. (4) Ellsworth/Fitzgerald.⁵ In 1979, Dr. Ellsworth and Robert Fitzgerald conducted a survey of a random sample of 811 jury-eligible adults in Alameda County, California, and asked them: (i) whether they would consider voting to impose the death penalty, and whether they could be fair and impartial

RT 510-545 (testimony of Dr. Edward Bronson); RT 761-764 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1293-94; 758 F.2d at 233; Keeten, 578 F. Supp. at 1173-74; Hovey, 28 Cal.3d at 45-47, 616 P.2d at 1328-30.

⁵Ellsworth, Phoebe C., and Fitzgerald, Robert, Due Process vs. Crime Control: Death-Qualification and Jury Attitudes. Published in 8 Law and Human Behavior 31 (1984). Exhibits EB-64 and RH-10 (text, pre-publication draft) and EB-65 through EB-2, EB-98, EB-90 and RH-11 through RH-14 (charts); CH-31-A, pp. 695-780 (testimony of Dr. Ellsworth); RT 546-564 (testimony of Dr. Edward

in determining guilt or innocence in a capital case; and (ii) 13 questions on other criminal justice issues.

Each of these studies found a consistent and statistically significant relationship between death penalty attitudes and other criminal justice attitudes: Persons who oppose the death penalty in general, and those who are excluded under Witherspoon in particular, are less likely to favor the prosecution on other issues. The most recent study, Ellsworth/Fitzgerald, further showed that this effect persists after jurors who could not be fair on guilt are removed from consideration. Each of these surveys also found that death-qualification disproportionately excludes blacks and women, a finding that is corroborated by

Bronson); RT 764-780 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1293-94; 758 F.2d at 233; Keeten, 578 F. Supp. at 1171-72; Hovey, 28 Cal.3d at 50-54, 616 P.2d at 1333-37. See JA 107-133, 136-137.

an extensive series of National Polls⁶ which shows that since 1953 blacks and women have opposed the death penalty more than whites and men, and by the Precision Research survey,⁷ which found that blacks and women were disproportionately likely to be excluded by death-qualification in Arkansas in 1981.

II. The process of death-qualification. The major study on the effects of the process of death-qualifying

⁶Louis Harris & Associates, Inc., American Institute for Public Opinion (Gallup), and National Opinion Research Center, Various national polls from 1953 through 1978, partially summarized in: Smith, Tom W., "A Trend Analysis of Attitudes Toward Capital Punishment, 1936-1974," in Davis, James A. (ed.), Studies of Social Change Since 1948, National Opinion Research Center Report 1278, Chicago (1976). Exhibit EB-91 (text) and EB-92 through EB-130 (charts); RT 583-593 (testimony of Dr. Edward Bronson); 902-904 (testimony of Dr. Reid Hastie). Discussed in: Hovey 28 Cal.3d at 54-57, 616 P.2d at 1337-39. See JA 134-135.

⁷Precision Research, Inc., Exhibit DE-1 (text); RT 1301-1319 (testimony of Mr. Dale Enoch). Discussed in: Grigsby, 569 F. Supp. at 1294; 758 F.2d at 233.

voir dire is the Haney study.⁸ Dr. Haney showed a videotape of voir dire in a capital case to two randomly assigned groups of death-qualified jury-eligible subjects. One group saw a tape of voir dire with death-qualification; the other saw the same tape without the death-qualification segment. Subject jurors who viewed the death-qualifying voir dire were substantially and statistically significantly more likely to believe, without hearing any evidence, that the defendant was guilty, that he would be convicted, and that the judge and the defense attorney also believed that he was guilty.

III. The behavior of jurors on guilt

⁸Haney, Craig, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process. Published in 8 Law and Human Behavior 121 (1984). Exhibits CH-34 and RH-30 (text, pre-publication draft) and CH-47 through CH-51 (charts); RT 227-235, 241-310 (testimony of Dr. Haney); RT 854-856 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1302-05; 758 F.2d at 234; Keeten, 578 F. Supp. at 1175-76; Hovey, 28 Cal.3d at 75-79, 616 P.2d at 1350-53. See JA 101-106.

or innocence. The record contains six separate studies on the effects of death-qualification on jury behavior: (1) The earliest study on this issue is the Zeisel study.⁹ In 1954-55 Professor Zeisel interviewed over 400 jurors who had served in felony trials in Brooklyn and Chicago, and determined that, controlling for the strength of the evidence in the case, jurors without conscientious scruples against the death penalty were more likely to vote for guilt on the first ballot than those with such scruples. This finding has been replicated in five experimental studies: (2) In the Wilson¹⁰ study in 1964

⁹Zeisel, Hans, "Some Data on Juror Attitudes Toward Capital Punishment," Monograph, Center for Studies in Criminal Justice, University of Chicago Law School (1969); Exhibits CH-5 and RH-23 (text and charts); RT 78-90 (testimony of Dr. Craig Haney); RT 805-820 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1295-96; 758 F.2d at 233; Keeten, 578 F. Supp. at 1174; Hovey, 28 Cal.3d at 27-30, 616 P.2d at 1315-17. See JA 21-76.

¹⁰Wilson, W. Cody, "Belief in Capital Punishment and Jury Performance," unpublished (1964).

and (3) in the Goldberg¹¹ study in 1966, college-student subjects were given written descriptions of the evidence in criminal cases, and asked to determine guilt or innocence. (4) In the Jurow study¹² in 1970, industrial workers

Exhibits CH-6, EB-29 and RH-24 (text) and CH-7 and EB-20 (charts); RT 91-106 (testimony of Dr. Craig Haney); RT 820-823 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1295-96; 758 F.2d at 233; Keeten, 578 F. Supp. at 1174; Hovey, 28 Cal.3d at 32-33, 616 P.2d at 1315-17.

¹¹Goldberg, Faye (Faye Girsh), Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law, 5 Harv. C.R.-C.L.L. Rev. 53 (1970). Exhibits EB-27, CH-8 and RH-25 (text) and EB-28, EB-85, EB-86 and CH-9 (charts); RT 91-106 (testimony of Dr. Craig Haney); RT 492-494 (testimony of Dr. Edward Bronson); RT 823-824 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1295-96; 758 F.2d at 233; Keeten, 578 F. Supp. at 1174; Hovey, 28 Cal.3d at 30-31, 616 P.2d at 1317-18.

¹²Jurow, George L., New Data on the Effects of a "Death-Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971). Exhibits CH-10 and RH-26 (text) and CH-11 through CH-15 (charts); RT 107-123 (testimony of Dr. Craig Haney); RT 824-826 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1296-97; 758 F.2d at 234; Keeten, 578 F. Supp. at 1174; Hovey, 28 Cal.3d at 33-36, 616 P.2d at 1319-21.

listened to two brief audio-tape simulations of criminal trials, and indicated their verdicts. (5) In the Harris 1971 survey¹³ (see supra), respondents in a national population sample were given four written case descriptions and asked to judge guilt. (6) In the Ellsworth/Thompson/Cowan study,¹⁴ jury-eligible subjects who could be fair and impartial on guilt in a

¹³Supra App. p. 98, n.6. Exhibits CH-13, EB-32 and RH-9 (text) and CH-18 through CH-24 (charts); RT 124-132 (testimony of Dr. Craig Haney); RT 826-827 (testimony of Dr. Reid Hastie). This aspect of the Harris 1971 survey is discussed in: Grigsby, 569 F. Supp. at 1297-98; 758 F.2d at 234; Keeten, 578 F. Supp. at 1173-74; Hovey, 28 Cal.3d at 36-37, 616 P.2d at 1321-23.

¹⁴Ellsworth, Phoebe C.; Cowan, Claudia; and Thompson, William, Juror Attitudes and Conviction Proneness: The Relationship Between Attitudes Toward the Death Penalty and the Predisposition to Convict. Published in 8 Law and Human Behavior 53 (1984). Exhibits CH-24 and RH-28 (text, pre-publication draft) and CH-25 through CH-31 (protocols and charts); CH-31-A, pp. 805-823 (testimony of Dr. Ellsworth); RT 135-165 (testimony of Dr. Craig Haney); RT 827-842 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1298-1301; 758 F.2d at 234; Keeten, 578 F. Supp. at 1174-75; Hovey, 28 Cal.3d at 38-40, 616 P.2d at 1323-25. See JA 77-88.

capital case viewed a detailed 2-1/2 hour videotaped simulation of a homicide trial, with complete legal instructions, and gave their verdicts.

The results of these experimental studies are strong, and uniformly confirm Dr. Zeisel's finding on actual jury behavior. Wilson: subjects with conscientious scruples against the death penalty voted to convict in fewer cases than those without such scruples ($p < .02$); Goldberg: subjects with death-penalty scruples voted to convict 6% less often than those without ($p < .08$); Jurow: the stronger the subjects' endorsement of the death penalty, the more likely they were to convict ($p < .01$ in case 1; n.s. in case 2); Harris, 1971: respondents who would never vote for the death penalty voted to convict less often in each of four cases, by an average of 7% (3 p 's $< .01$, 1 $p < .10$); Ellsworth/Thompson/Cowan: fair and impartial subjects who would never vote

for the death penalty voted to convict 25% less often than the remaining fair and impartial subjects ($p < .01$).

These findings are further bolstered by several experimental studies on the mechanisms of jury decision-making. In particular, in the Ellsworth Post-Deliberation Study¹⁵, subjects from the Ellsworth/Thompson/Cowan study deliberated for one hour in panels of 12, and then provided data which show that: (i) after deliberations, death-qualified jurors remained far more likely to vote for conviction than Witherspoon-excludables ($p < .01$); (ii) jury panels that included Witherspoon-excludables were more critical of all witnesses, and better able to

¹⁵Cowan, Claudia; Thompson, William; and Ellsworth, Phoebe C.; The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation. Published in 8 Law and Human Behavior 53 (1984). Exhibits CH-32 through CH-36, RH-39, RH-41, RH-42 (protocols and charts); CH-31-A, pp. 823-833 (testimony of Dr. Ellsworth); RT 172-190 (testimony of Dr. Craig Haney); RT 886-895 (testimony of Dr. Reid Hastie).

remember facts, than death-qualified juries; (iii) death-qualified jurors were more likely to believe the prosecution witnesses and less likely to believe the defense witnesses than Witherspoon-excludable jurors. This last finding was also replicated in the Ellsworth Witness Credibility Study,¹⁶ while other studies in the record show that death-qualified jurors are more hostile to the insanity defense than Witherspoon-excludables,¹⁷ and that they have a higher standard for

Discussed in: Grigsby, 569 F. Supp. at 1302; Hovey, 28 Cal.3d at 39-40 n.78, 60, 616 P.2d at 1324-25, n.78, 1341. See JA 89-92.

¹⁶Ellsworth, Phoebe C.; Harrington, Joan C.; Thompson, William; and Cowan, Claudia, Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts. Published in 8 Law and Human Behavior 45 (1984). Exhibits CH-37 and RH-45 (text, pre-publication draft) and CH-38 (chart); CH-31-A, pp. 790-797 (testimony of Dr. Ellsworth); RT 193-203 (testimony of Dr. Craig Haney); RT 895-901 (testimony of Dr. Reid Hastie). Discussed in: Grigsby, 569 F. Supp. at 1302; 758 F.2d at 234; Keeren, 578 F. Supp. at 1175; Hovey, 28 Cal.3d at 59-60, 616 P.2d at 1340-41. See JA 93.

¹⁷ Ellsworth, Phoebe C.; Bukaty, Raymond M.;

what constitutes a "reasonable doubt."¹⁸

IV. "Automatic Death Penalty" jurors (ADP's). The record contains two surveys on the size of the "automatic death penalty" (ADP) group -- i.e., on the proportion of jurors who might be excluded from capital trials because they would automatically vote for the death penalty on every capital conviction. (1) The Harris 1981 survey¹⁹ polled a representative national sample of 1498 adults

Cowan, Claudia L.; and Thompson, William C., The Death-Qualified Jury and the Defense of Insanity, 8 Law and Human Behavior 81 (1984). Exhibits CH-42-1 and RH-22 (chart); RT 212-215 (testimony of Dr. Craig Haney); RT 786-788 (testimony of Dr. Reid Hastie). See JA 100.

¹⁸ Thompson, William C.; Cowan, Claudia L.; Ellsworth, Phoebe C.; and Harrington, Joan C., Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts. Published in 8 Law and Human Behavior 95 (1984). Exhibits CH 39-42 and RH 31-32 (protocols and charts); RT 204-211 (testimony of Dr. Craig Haney); RT 857-859 (testimony of Dr. Reid Hastie). Discussed in: Hovey, 28 Cal.3d at 57-58, 616 P.2d at 1339-40. See JA 94-99.

¹⁹ Louis Harris & Associates, Inc., Study No. 814002 (1981). Exhibits EM-2 through EM-4

and found that only 1% of those who would be fair and impartial on guilt or innocence in a capital case would automatically vote for the death penalty upon conviction for any capital murder. (2) The Arkansas Archival Study,²⁰ a summary of the voir dire transcripts in the 41 Arkansas capital cases from 1973 through 1981 whose records are on file with the Arkansas Supreme Court, reveals that 0.5% of all jurors who were questioned were excused as ADP's, compared to 14.4% who were excluded on Witherspoon grounds.²¹

(protocols and text); RT 1577-1608 (testimony of Ms. Elizabeth Montgomery). Discussed in: Grigsby, 569 F. Supp. at 1302; 758 F.2d at 236; Keeten, 578 F. Supp. at 1170.

²⁰ Young, Andrea, "Arkansas Archival Study" (1981). Exhibits AY-1, AY-3, AY-5 through AY-7 (protocols and text); AY-2, AY-4 (charts); RT 1679-1702 (testimony of Ms. Andrea Young). Discussed in: Grigsby, 569 F. Supp. at 1307; 758 F.2d at 234. See JA 138-146.

²¹ In addition to the studies summarized here, the record contains a study by the State's expert, Dr. Gerald Shure, on the question of "automatic death penalty" jurors. We have omitted the Shure

study from this Appendix because its author testifies that it is not reliable (see. e.g., RT 996, 1008, 1051, 1181, 1199)--a conclusion shared by both courts below, 569 F. Supp. at 1307-08, 758 F.2d 235-38--and because neither party before this court purports to rely on it. Thus, for example, at p. 20 of its Brief in the Eighth Circuit the State points out that "Shure candidly cautioned that his study was not to be advocated as 'proof' of anything (T. 1058, 1068-69)."

REPLY BRIEF

No. 84-1865

Supreme Court, U.S.

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION *Petitioner*

VS.

ARDIA V. MCCREE *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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No. 84-1865

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The issue in this case is clear. It is whether those jurors who state they will not impose the death penalty at the sentencing phase of a capital murder trial may be constitutionally excluded from the guilt phase of the trial. McCree argues that they may *not* be excluded from the guilt phase and urges this Court to require the State to alter its present jury system in capital murder cases.

The Brief for Respondent justifies a reply for purpose of reiteration and clarification of the State's position in this case.

There are two constitutional provisions involved, the fair cross-section requirement of the Sixth Amendment and the Fourteenth Amendment due process right to have an impartial jury. The State contends that its unitary jury system, wherein a single jury decides both guilt or innocence and sets punish-

ment, does not infringe upon either of the constitutional rights at issue.

1. The State of Arkansas has determined through its legislature that in capital cases the issues of guilt and punishment should be decided by the same jury. Under this procedure, the State also exercises the option granted in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), to prevent any juror from deciding the sentence if he states that he would refuse, under any circumstances, to vote for one of the options available under state law — i.e., the death penalty. The respondent has failed to show why the Constitution demands that the *Witherspoon*-excludables be eligible for guilt-phase juries in capital cases.

As already pointed out by the State, significant historical and moral values underlie the State's interest in having a single jury decide capital cases. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), *cert. denied*, 104 S.Ct. 2370 (1984). This unitary system is clearly the most economical in terms of both time and resources. But far more important are its non-quantifiable advantages in terms of improving the deliberations of the jury at both the guilt and sentencing phases of the trial. Such a system assures that the persons who make the difficult decision as to guilt or innocence do so with the solemn knowledge that they will then have to decide on punishment. Conversely, the State's system also assures that the persons with the responsibility of deciding on the death penalty do so only after they have deliberated together on the question of guilt.

2. The necessity of distinguishing between the two rights at issue in this case is revealed by the confusion in the decisions below. When the scope of each of these constitutional rights is properly understood, it is clear that the State's jury system does not violate either one.

As developed below, respondent has failed to show that his jury was biased, since there is no basis for concluding that it based its verdict on anything other than the facts and law presented to it. Nor can McCree rely on the theory that the unitary jury system is unrepresentative because it excludes a distinct part of the community. *Witherspoon*-excludables are not such a distinctive group. Moreover, even if they were, the State could certainly justify its system based on its significant interests in using a single jury to decide both guilt and punishment.

a. RESPONDENT'S JURY WAS NOT BIASED.

Respondent's evidence does not even begin to show actual juror bias as it must within the meaning of this Court's opinions. *Irwin v. Dowd*, 366 U.S. 717 (1961); *Patterson v. Colorado*, 205 U.S. 454 (1907). The record provides no basis whatever for concern that the jurors who voted to convict him violated their oaths and relied on something other than the evidence and arguments presented and the court's instructions. Indeed, respondent has presented no attack of any kind on the performance of the jurors who were allowed to sit on his jury. Instead all that respondent sought to prove below was that *Witherspoon*-excludables, the persons *excluded* from his jury, are on average more sympathetic to criminal defendants than are other jurors.

What the Constitution requires is not a jury with the particular mix of viewpoints that respondent would prefer, but a jury made up entirely of persons who can and will evaluate the evidence fairly. It would be folly to go beyond this basic requirement and find jury bias in every case where a defendant can show that his jurors' attitudes somehow did not perfectly mirror the range of attitudes in the general population. In sum, even accepting all of respondent's evidence, it falls far short of supporting his claim that juries without *Witherspoon*-excludables are biased.

b. THE STATE'S JURY SYSTEM DOES NOT VIOLATE THE CROSS-SECTIONAL REPRESENTATIVE REQUIREMENT.

The court below did not address McCree's claim that his jury was biased. The Court relied instead on the theory that the exclusion of *Witherspoon*-excludables from the jury during the guilt phase of the trial denied respondent's Sixth Amendment right to a jury drawn from a fair cross-section of the community. Yet in finding a cross-section violation, the court also reached the conclusion that McCree's jury was conviction-prone without McCree having to demonstrate that the jury was actually biased. In the process, the court seriously distorted the requirement of cross-sectional representation.

The State's brief has already noted the serious flaws in the lower court's cross-section analysis. However, the most significant failure by the lower court was in failing to consider or address the State's legitimate interest in having a unitary jury system in capital cases. Respondent has failed to account for this defect.

The inescapable conclusion is that the lower court has hopelessly confused the two separate and distinct issues involved in this case and that its faulty analyses cannot justify the result it reached.

3. Finally, the evidence introduced below simply falls far short of the kind of conclusive showing that this Court must demand before creating a new constitutional entitlement such as McCree argues for here.

CONCLUSION

For the reasons stated in the State's brief and in this reply brief, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

6
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Supreme Court, U.S.
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A. L. LOCKHART,

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Respondent.

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to the United States Court of Appeals
for the Eighth Circuit

**BRIEF OF AMICI CURIAE,
ALABAMA, CONNECTICUT, FLORIDA,
GEORGIA, IDAHO, ILLINOIS, INDIANA,
MISSISSIPPI, MISSOURI, NEW HAMPSHIRE,
NEW JERSEY, NEW MEXICO, OREGON,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
BRIEF OF AMICI CURIAE	1
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. ARKANSAS WAS ENTITLED TO CONCLUDE THAT THE "TWO-JURY" SYSTEM PREFERRED BY THE COURT BELOW WOULD ACTUALLY BE LESS FAIR, NOT MORE FAIR, TO DEFENDANTS	5
A. <i>Arkansas Could Reasonably Conclude That Jurors Would be More Likely to Return a Sentence of Death if the Same Jury Does Not Share the Moral Responsibility of Deciding Defendant's Guilt</i>	5
B. <i>Arkansas Could Reasonably Conclude That Removal of Sentencing Responsibility Would Also Affect Some Guilt-Innocence Jurors Adversely to Defendant, by Making Them More Likely to Convict</i>	10
C. <i>In a Federal System, Arkansas Should Have Leeway to Consider Its Unitary Jury System Fairer to Defendants and to Reject Respondent's Suggestion that It Instead Replace Its Juries With Sentencing Judges</i>	10
II. JURORS WHO ARE SO BIASED THAT THEY CANNOT CONTEMPLATE THE SENTENCE AUTHORIZED BY LAW, AND YET WHO ARE SIMULTANEOUSLY	

SO UNBIASED ON GUILT THAT THEY CAN DECIDE IT COMPLETELY UNINFLUENCED BY THAT SAME SENTENCE BIAS, DO NOT CONSTITUTE A LEGALLY "COGNIZABLE GROUP" 12

- A. *The Majority Below Misapprehended the Case in That It Repeatedly and Erroneously Assumed That the "Group" at Issue was the Entire Class of "Witherspoon Excludables," When, Actually, the Result Below Depends Upon Individuals Who Are Disqualified by Such Thorough Bias That They Cannot Consider Sentence, But Who Are Simultaneously so Free of That Bias That They Can Decide Guilt or Innocence Completely Free of Its Influence* 13
- B. *The Sociological Studies Upon Which the Majority Below Relied Do Not Accurately Reflect the Characteristics of These Hypothetical "Absolutely Biased, Yet Simultaneously Unbiased" Venirepersons, and Do Not Demonstrate That They Are an Identifiable or Cognizable Group* 14

III. TO OVERLAY THE WITHERSPOON-WITT INQUIRY WITH YET ANOTHER SET OF LEGAL CONCEPTS THAT LAY JURORS MUST UNDERSTAND AND ACCURATELY APPLY TO THEMSELVES WOULD MAKE THE STATES' IMPORTANT INTERESTS IN CONSISTENT AND IMPARTIAL ADJUDICATION OF CAPITAL CASES MORE DIFFICULT TO ACHIEVE 16

- A. *The Straight Witherspoon-Witt Inquiry is Itself Difficult for Many Lay Jurors to Answer With Precision* 17
- B. *A Statement of Bias Against Sentence But Impartiality on Guilt-Innocence is Only a Prediction of the Venire Member's Future Behavior Under Conditions That he Can Only Imagine.*

The Likelihood That Such a Prediction Will be the Product of Poor Communication, Confusion, or Overestimation of His Capacity for Impartiality is Increased by the Complexity of the Inquiry Mandated Below 20

- C. *The Result Reached by the Majority Below Would Make Consistency in Capital Sentencing More Difficult to Achieve* 22

IV. FINDINGS ABOUT SOCIAL SCIENTISTS' OPINIONS FROM A CONFLICTING RECORD SHOULD NOT BE ENACTED INTO POSITIVE CONSTITUTIONAL LAW BY THE DECISION OF A SINGLE TRIAL JUDGE CONSIDERING NATIONWIDE "LEGISLATIVE" FACTS 23

- A. *The Evidence Does Not Justify the Sweeping Nationwide Inferences Made Below* 24
- B. *Single-Judge Fact Findings on Sociological Evidence Cannot Resolve Ultimate Constitutional Issues* 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Andreas v. United States, 333 U.S. 740 (1948)	22
Baumgartner v. United States, 322 U.S. 665 (1943)	29
Castenada v. Partida, 430 U.S. 482 (1977)	15
Derenyi v. Immigration Service, 385 U.S. 630 (1967)	29
Duren v. Missouri, 439 U.S. 357 (1979)	15
EEOC v. Fed. Reserve Bank of Richmond, 698 F.2d 633 (1983)	26
Furman v. Georgia, 408 U.S. 238 (1972)	11, 23
Granviel v. State, 655 F.2d 673 (1981)	18
Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1951)	29
Gregg v. Georgia, 428 U.S. 153 (1976)	12, 23, 28
Hernandez v. Texas, 347 U.S. 475 (1953)	15
Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980)	24
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	29
Jurek v. Texas, 96 S.Ct. 2950 (1976)	28
Keeten v. Garrison, 742 F.2d 129 (1984)	24
Lockett v. Ohio, 438 U.S. 586 (1978)	11
McCleskey v. Kemp, 753 F.2d 877 (1985)	24, 25
Marsh v. Chambers, 463 U.S. 783 (1983)	27
Mayor v. Educational Equality League, 415 U.S. 605 (1974)	29
Neil v. Biggers, 409 U.S. 188 (1972)	29
O'Bryan v. Estelle, 714 F.2d 365 (1983)	18, 19, 21
Pitts v. Lockhart, 753 F.2d 689 (1985)	2
Presseissen v. Swarthmore College, 442 F. Supp. 593 (1977)	26
Proffitt v. Florida, 428 U.S. 242 (1976)	11
Rector v. State, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 104 S.Ct. 2369 (1984)	24
Schall v. Martin, 104 S.Ct. 2403 (1984)	28
Smith v. Balkcom, 660 F.2d 573 (1981)	6, 24
Spinkellink v. Wainwright, 578 F.2d 582 (1978)	21, 23, 24
United States v. Puff, 211 F.2d 171 (1954)	22

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passim

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24

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26

Witherspoon v. Illinois, 391 U.S. 510 (1968)

passim

Woodard v. Sargent, 753 F.2d 694 (1985)

2

SECONDARY AUTHORITIES

Campbell, <i>Regression and Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet</i> , 36 STAN. L. REV. 1299 (1984)	26
Crump, <i>Capital Murder: The Issues in Texas</i> , 14 HOUSTON L. REV. 531 (1977)	17, 18
D. Crump & G. Jacobs, CAPITAL MURDER (1977)	7
Daniels, <i>Social Science and Death Penalty Cases</i> , 1 L. & POL'Y Q. 336 (1979)	26
Erlich, <i>The Deterrent Effect of Capital Punishment: A Question of Life and Death</i> , 65 AM. ECON. REV. 397 (June 1975)	28
Greely, <i>Justice: Debunking the Role of Social Scientists in Court</i> , HUMAN RIGHTS: JOURNAL OF THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES OF THE AMERICAN BAR ASSOCIATION 34 (1978)	28
H. Calven & H. Zeisel, THE AMERICAN JURY (1966)	25
Kammen, <i>Final Arguments in a Death Penalty Case</i> , NATIONAL COLLEGE FOR CRIMINAL DEFENSE, DEATH PENALTY DEFENSE 13 (1983)	5
Nagel, <i>Law and the Social Sciences: What Can Social Science Contribute?</i> 356 A.B.A.J. 356 (1965)	26
O'Brien, <i>The Seduction of the Judiciary</i> , 64 JUDICATURE 8 (1980)	25
Sperlich, <i>Social Science Evidence and the Courts: Reaching Beyond the Advisory Process</i> , 63 JUDICATURE 280 (1980)	25

NO. 84-1865

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ARDIA V. McCREE,

Respondent.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are States whose capital sentencing procedures include decisions by juries. Amici also include States whose capital sentencing is accomplished by judges with or without the intervention of juries, but which nevertheless have an interest in the decision below.*

For States using juries, the decision below is of immediate importance because it undermines the validity of existing convictions in capital cases. These States' interest is compelling, in that

* The decision presents questions concerning juror bias and disqualification that may have impact upon States whose sentencing is done by judges, even though those States may not experience the wholesale reversals that could occur in States using juries.

the Eighth Circuit's holding could, if upheld, result in the wholesale release from their convictions of persons who have been found guilty of this society's most serious murders over the past half-generation.¹ Furthermore, the decision would require fundamental changes in these States' capital sentencing statutes. Those changes would be harmful to the States, and, equally importantly, they would be harmful to defendants in capital cases.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case made by Petitioner Lockhart.

SUMMARY OF ARGUMENT

Amici curiae will not duplicate the case law arguments that Arkansas has made, although amici agree with those arguments and wish to express support for them. Instead, this amicus curiae brief concentrates on issues of public policy.^{1a}

1 The holding would reverse convictions, not merely sentences. Further, because the Eighth Circuit has held the decision retroactive, see *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985), and has also held procedural default not an obstacle to its assertion, *Id.*, Arkansas and other States face the prospect that virtually all convictions in capital cases—their most serious cases of murder—might be invalidated wholesale unless the decision is reversed. It is difficult to overstate the impact the decision has had upon Arkansas, in that the Eighth Circuit has already begun the process of systematically reversing convictions in Arkansas capital cases, including those resulting in life imprisonment (or presumably, even lesser convictions or sentences). E.g., *Pitts v. Lockhart*, 753 F.2d 689 (8th Cir. 1985) (life-without-parole sentence reversed on same day *Woodard*, holding present case retroactive, was decided; conviction for kidnap-murder, in which victim was taken from his home, bound, gagged, transported in his own vehicle, and found shot four times in the head, also reversed for same reason).

1a Similarly, amici curiae agree with and express support for the excellent arguments of Oklahoma, et al. as amici curiae.

Oklahoma's brief demonstrates the impact that the decision

I.

Arkansas was entitled to conclude that the decision below would actually be less fair to defendants in capital cases. Jurors should share the moral responsibility both for finding guilt and for deciding sentence. A major restraint against erroneous use of capital punishment would be removed by the proposals of the majority below. Furthermore, some jurors who would be relieved of sentencing responsibility in a death penalty case would be less restrained in finding guilt. Finally, Respondent's assertion that Arkansas is "free . . . to move toward judge sentencing" is beside the point. In a federal system, Arkansas should be free to consider its procedure fairer than Respondent's suggestion that Arkansas replace all its juries with sentencing judges.

II.

Venire members who are "absolutely biased on sentence, yet completely free of that same bias in deciding guilt," are not a legally "cognizable group." The majority below concluded that the entire class of "Witherspoon excludables" was a "sizeable" group, but the actual group at issue—those "absolutely biased on sentence, yet completely free of that bias on guilt"—must be extremely small and very difficult to identify. Confusion and poor communication in voir dire examination is the most likely reason that a lay venire member would express such a theoretically possible, but ostensibly contradictory, state of mind.

below would have. The brief shows persuasively how great a departure from the reasonable expectations of the States the decision below is. Oklahoma's thorough brief also demonstrates the extensive case law authority elsewhere, unanimously rejecting the decision below.

Oklahoma further shows that if the "group" at issue here is a cognizable one that cannot constitutionally be excluded, the consequence would be to require that the States ensure representation of diverse, attitudinally-defined groups ranging from "anti-authoritarians" to "mobile persons." Oklahoma's demonstration of that absurd result reinforces the argument, in this brief, that the "groups" at issue are not cognizable because they are not readily capable of accurate identification.

III.

The decision below would make the Witherspoon-Witt inquiry less accurate and would thereby decrease the consistency demanded in capital trials. The straight Witherspoon-Witt inquiry is itself difficult for lay venire members to answer with precision. Yet the decision below would overlay that inquiry with the addition of yet a third complex and inherently self-contradictory category, which venire members must understand and accurately apply to themselves. Such a test would dissolve into uncertainty when applied to the often inconsistent and garbled responses of real-world jurors. Furthermore, a prediction of "absolute bias on sentence, but complete freedom from that same bias in deciding guilt," carries a high probability of inaccuracy, in that the venire member is more likely than not to have overestimated his ability to be impartial in disregard of the consequences. Many courts have recognized the possibility that these undetectable nullifiers might be joined by others who would consider it their moral duty to serve on the jury and vote against guilt solely to prevent the possibility of capital punishment.

IV.

Ultimate fact inferences from contradicted and impeached social science evidence by a single district judge should not bind the nation on legislative issues of constitutional law. In fact, the direct testimony in the record concerning behavior of juries in capital cases contradicts the holdings below, but it was ignored by the lower courts. Furthermore, it is inappropriate knowingly to overlook recognized "deficiencies" in sociological or statistical evidence, as did the majority below. The enactment of preferred theories of sociology, on a conflicting record, into positive constitutional law fails to give appropriate weight to other considerations (such as, in this case, fairness to defendants), and it should not substitute for the theory of government chosen under the Constitution.

ARGUMENT

I. ARKANSAS WAS ENTITLED TO CONCLUDE THAT THE "TWO-JURY" SYSTEM PREFERRED BY THE COURT BELOW WOULD ACTUALLY BE LESS FAIR, NOT MORE FAIR, TO DEFENDANTS.

The decision below would have a number of very harmful effects as a matter of policy. For example, defendants in capital cases would be worse off, not better off, as a result of that decision.

A. *Arkansas Could Reasonably Conclude That Jurors Would be More Likely to Return a Sentence of Death if the Same Jury Does Not Share the Moral Responsibility of Deciding Defendant's Guilt.*

The responsibility of deciding guilt in a capital case weighs heavily upon jurors. The analysis necessary to decide guilt, followed in sequence by the responsibility in the same individuals to determine sentence, prompts significant caution in most jurors at the sentencing stage. Conversely, the most effective argument that the defense may have against the death penalty in many cases is the presence of residual doubts about guilt.² Even aside from that effect, jurors who have shared the moral responsibility

² This is a "particularly powerful" argument, according to a publication of the National College for Criminal Defense. The College says that the defense attorney should argue that death "is an absolute punishment and . . . is not appropriate for one who is not absolutely guilty (if there are lingering doubts in the evidence)." Kammen, Final Arguments in a Death Penalty Case, in NATIONAL COLLEGE FOR CRIMINAL DEFENSE, DEATH PENALTY DEFENSE 13 (1983). See also, e.g., TEXAS DISTRICT & COUNTY ATTORNEYS ASS'N, CAPITAL MURDER SEMINAR A-1 (1980) (less-than-ironclad guilt evidence often leads jury not to return death penalty).

for a community finding of guilt and who have deliberated over the existence of small remaining doubts are thereby induced to be more cautious in later considering the death penalty. This characteristic of juries currently deciding capital cases serves as an important additional safeguard against erroneous use of capital punishment.

If, however, a *Witherspoon-Witt*-qualified³ jury were to receive the case for the first time at the sentencing stage, and if the jurors were instructed that the defendant had already been found guilty, a major restraint against assessment of the death penalty would be removed. The Fifth Circuit articulated this concern eloquently in *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981), as follows:

... There is a potential benefit to a defendant ... which would be lost were the jury which found guilt discharged and a new jury empanelled to decide punishment

The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt ... and yet some genuine doubt exists. It may reflect a real possibility; ... [an] absence of absolute certainty

... [T]he juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the ... penalty of death

The scheme appellant here urges upon us would effectively destroy [this restraint.] The guilt-determining jurors—including those not absolutely certain—would be thanked for their service and discharged. A new jury, including only those willing

³ *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 53 U.S.L.W. 4108 (U.S.S.Ct. Jan. 21, 1985).

to impose the death penalty, would be selected. They would entertain no doubt that the defendant before them was, indeed, the guilty party. Presumably they would be instructed that the defendant was the guilty party. They would hear only evidence of aggravating circumstances ... and mitigation if there be evidence of such. Not even a flimsy alibi would disturb their deliberations; no suggestion of misidentification would be material. [This "two jury" proposal] would involve a more serious deprivation of the benefits of the constitutionally guaranteed jury trial than envisioned by Smith's advocates in this appeal.

Id. at 580-81. The court concluded that the two jury proposal "would deprive the capital defendant of important benefits which the current system affords him." *Id.*

One can better understand the consequent disadvantage to the defendant by considering an accused who presents an alibi to a heinous capital murder.⁴ His position is not that the crime is not deserving of the death penalty; instead, he contends that he was not there. But his alibi evidence is thin and is rejected by the guilt-innocence jury. He is found guilty of a capital crime. Next, a *Witherspoon-Witt*-qualified jury is impanelled to decide whether capital punishment should be imposed. Should the defendant present his alibi evidence again? Or should he simply express acceptance of the first jury's verdict and rapidly shift to

⁴ Thus in one particularly atrocious case involving the rape-murders of two young women, defense counsel's final argument on sentence was less than thirty seconds long and included the following:

"You've convicted the wrong man. You should have found him not guilty. And since you shouldn't have convicted him in the first place, I'm not going to plead for his life now."

The jury returned a sentence of life imprisonment rather than death. Defense counsel attributed this verdict to the fact that "the jury had a doubt that [the defendant] did it." D. CRUMP & G. JACOBS, CAPITAL MURDER 121-24 (1977).

argument that the murder was not as heinous as it might appear? If he does attempt to present the alibi, should not the court exclude it from evidence, on the ground that it is not relevant to any material issue since the defendant has been found guilty, and only his sentence remains to be determined?

Respondent suggests that these difficulties could be avoided by impanelling both juries at the beginning and by having both simultaneously hear the guilt evidence.⁵ But that procedure may not be better for the defendant; arguably, it would be worse. The presence of both juries would be a dramatic way of impressing all twenty-four jurors with their limited roles. Sitting beside the guilt-innocence juror would be another juror whose sole function would be to decide sentence; that issue need be none of the guilt-innocence juror's concern. Later, a juror deciding the penalty phase would remember the explanation given at the beginning: The reason another jury is present in the courtroom is that it will decide guilt, and this juror's sole responsibility is to decide sentence. Furthermore, the deliberate impanelling of a separate sentencing jury, before the defendant's guilt is established, would carry an obvious and undesirable message to jurors deciding guilt or innocence.

Similar deficiencies affect the idea, also suggested by Respondent, of partially replacing the jury at the sentencing stage. New jurors would be relieved of responsibility for deciding guilt. Those remaining from the guilt stage would be impressed with the finality of that decision by the departure of

5 Respondent says that Arkansas is "free to empanel additional jurors, to have two juries hear the case simultaneously, to move toward judge sentencing, to entrust the jury deliberations to whatever jurors are selected, or to employ any other procedural device" conforming to the preferences of the majority below. Memorandum in Response to Petition for Certiorari at 7 (typewritten version).

Every one of these suggestions may legitimately be viewed by Arkansas as exhibiting severe disadvantages, some of which are discussed here. All would destroy the traditional role of juries in capital cases. Further, each is also contrary to the fundamental rule that the State as well as the defendant is entitled to impartial jurors.

jurors with whom they had shared deliberations--jurors who absolutely excluded capital punishment but had concurred in the guilty verdict. Furthermore, the evidence would have to be presented twice; the defendant would have to testify to his alibi, and be cross-examined about it, on two separate occasions, so that the replacements can hear it.

Simply dismissing the disqualified jurors after guilt is determined, and reducing the size of the jury, would also be unsatisfactory. Such an approach might reduce the size of the jury to an unacceptably small group. The States are entitled to conclude that a capital case should not be heard by a smaller-than-usual jury, of *ad hoc* size. Furthermore, the question is raised: Can a "late crystallizing" disqualified juror remove himself or herself by this means? The phenomenon of the juror who decides in midstream that he or she cannot judge a death sentence issue is not uncommon, but removing such jurors after the trial has started might be unfair to the defendant. Finally, this proposal of Respondent, like each of Respondent's other proposals, has the disadvantages, to defendants, of signalling the absoluteness of the guilt determination, removing restraint from the sentencing jurors, and overemphasizing sentence so that guilt-stage jurors might regard conviction as assumed.

But the most important point is that it may be desirable in a capital case for the moral responsibility for determining guilt and for deciding sentence to be combined in the same persons. The two issues are related. The very process of wrestling with large and small doubts, and of accepting the responsibility for entering a verdict upon guilt or innocence, and of then having shared responsibility for sentence, clearly has a salutary restraining effect upon jurors. For these reasons, Arkansas was entitled to conclude that its procedure was fairer to a capital defendant than the proposal for two separate entities preferred by the majority below.⁶

6 Amici do not suggest that the two-jury proposal would itself be constitutionally inappropriate. It may even have some advantages (although we submit that disadvantages far outweigh them). In a federal system, not all procedures must be uniform. There is not

B. *Arkansas Could Reasonably Conclude That Removal of Sentencing Responsibility Would Also Affect Some Guilt-Innocence Jurors Adversely to Defendant, by Making Them More Likely to Convict.*

The likely disadvantages to defendants, of the two-jury proposal, are not confined to the sentencing phase. There would be effects adverse to the defendant at the guilt-innocence phase, too. Jurors who know that their verdict of guilt will lead to the acceptance of responsibility by someone else for determining the difficult matter of sentence will obviously be less restrained in finding guilt of a capital crime than those who know that they must decide the death sentence issue themselves. Thus Arkansas would have been entitled to conclude that the two-jury proposal would also lead to a jury on guilt-innocence that would, ironically, be less fair to capital-case defendants.⁷

C. *In a Federal System, Arkansas Should Have Leeway to Consider Its Unitary Jury System Fairer to Defendants and to Reject Respondent's Suggestion that It Instead Replace Its Juries With Sentencing Judges.*

Arkansas should be free to retain sentencing juries if it believes that they temper capital sentencing with community restraint. However, the two-jury requirement is so cumbersome and undesirable that, if it were upheld, it would induce States that wish to retain rational capital sentencing to do away with juries, and to have death sentencing done exclusively by judges. Many capital case defendants would not desire that result. States in a federal system should be free to use juries for sentencing.

one "best" procedure, and Arkansas was entitled to make the sensible and rational choice it made here.

⁷ This is not the only possible effect on jurors. Their verdict might well be distorted by reluctance to pass the case on to twelve strangers. Or a Witherspoon-disqualified juror who had misrepresented or (more likely) overestimated his capacity to separate the guilt and sentencing issues might well hang the jury. See part III.(B) of this Brief below.

Of course, the use of judges rather than juries for sentencing is constitutional, and it clearly has features to recommend it.⁸ See *Proffitt v. Florida*, 428 U.S. 242 (1976); cf. *Lockett v. Ohio*, 438 U.S. 586 (1978) (reversing sentence on other grounds). Amici do not seek to argue the disadvantages of either judges or juries, but wish only to point out that juries, too, have features to recommend them, and that in a federal system, States should have practical choices. The use of jurors for capital sentencing should not be made so cumbersome as to force states to choose judge sentencing, when they prefer to retain juries.

Respondent's argument on this issue, quite simply, is astounding. Respondent argues that "Arkansas is free . . . to move toward to judge sentencing." Memorandum in Response to Petition for Certiorari at 7 (typewritten version). In thus arguing that Arkansas is "free" to abolish juries, and in seeking a procedure that would make juries so cumbersome as a practical matter that no State seeking rational sentencing could use juries, Respondent advocates a draconian result that might harm capital defendants.

Respondent thus seeks a wholesale, windfall reversal of convictions—not merely sentences—on grounds unrelated to the merits, by arguments that many States have concluded would make capital punishment more irrational and harsh. The reason is that the underlying premise of this argument is to preclude the possibility of workable capital punishment systems, even at the cost of making the law harsh and irrational. Such arguments, attempting to make the law regarding jury sentencing so draconian, that it cannot possibly work, have been used repeatedly; arguments asserted in the past, to the effect that capital punishment must be mandatory and that any conceivable possibility of

⁸ Judge-sentencing has the arguable virtue of greater consistency, which is an important value in death penalty cases. *Furman v. Georgia*, 408 U.S. 238 (1972). But juries have advantages such as community restraint. In a federal system, both procedures are appropriate.

clemency makes it unconstitutional, are another example.⁹ The argument would extend logic beyond its basis so that the law becomes so foolish that it cannot possibly function viably. The present case presents precisely that effort.¹⁰

II. JURORS WHO ARE SO BIASED THAT THEY CANNOT CONTEMPLATE THE SENTENCE AUTHORIZED BY LAW, AND YET WHO ARE SIMULTANEOUSLY SO UNBIASED ON GUILT THAT THEY CAN DECIDE IT COMPLETELY UNINFLUENCED BY THAT SAME SENTENCE BIAS, DO NOT CONSTITUTE A LEGALLY "COGNIZABLE GROUP."

The majority below misapprehended the issues in this case, in that it repeated and erroneously assumed that the excluded "group" at issue was the entire class of "Witherspoon excludables."¹¹ Instead, the validity of the opinion below depends upon positive and accurate identification of an alleged class of

9 See *Gregg v. Georgia*, 428 U.S. 153, 199 & n.50 (1976) (rejecting argument with the observation that it would effectively prohibit capital punishment by imposing impossible conditions for its use).

10 Respondent's attorneys, of course, properly must view their duty as owing to Respondent, and no criticism of the propriety or effectiveness of their action in tactically deciding how to discharge that duty is intended. It is respectfully submitted, however, that the harmful effects on a nationwide scale of the proposed procedures are an appropriate consideration for the Court.

11 The court upheld the district court's findings "that the [Witherspoon excludable] group is . . . between 11% and 17% of those eligible for jury service. So the group excluded is both distinct and sizeable." Slip Op. at 8.

The court missed the point. Many of the 11% to 17% would be excluded under the court's own holding, because they not only would be unable to assess a sentence of death but also would be unable to find guilt without bias in a capital case. The actual number at issue must necessarily be considerably smaller and more difficult to determine.

individuals—and it must be an extremely small class, if it is identifiable at all—who, at one and the same time, are (1) disqualified by bias so severe that they cannot even consider the lawfully available sentence, but who are simultaneously (2) so free of that bias that they can decide guilt or innocence completely unencumbered by it. While theoretically possible, such a state of mind must be exceedingly rare. Assuming that such individuals can be identified at all, they must be very few.

A. *The Majority Below Misapprehended the Case in That It Repeatedly and Erroneously Assumed That the "Group" at Issue was the Entire Class of "Witherspoon Excludables," When, Actually, the Result Below Depends Upon Individuals Who Are Disqualified by Such Thorough Bias That They Cannot Consider Sentence, But Who Are Simultaneously so Free of That Bias That They Can Decide Guilt or Innocence Completely Free of Its Influence.*

Witherspoon created two categories of jurors: those who could consider imposition of capital punishment, even though opposed to it, and those who could not. The decision below would create a third category: those who, although opposed to capital punishment and unable to consider its imposition, assert that they could find guilt or innocence fairly even though they thereby participate in the use of capital punishment through the guilt finding.

The linchpin of the reasoning of the majority below is the possibility that a juror might have a state of mind accurately communicated as follows:¹²

"Yes, I do absolutely oppose capital punishment. No, I cannot imagine any case (no matter how aggravated and no matter how terrifying) in which I could even contemplate a death sentence.

12 But it is very doubtful that the examination would be so clear as these responses. The juror's responses are likely to be far more ambiguous. See *infra* notes 14-17 and accompanying text.

Yes, that position is firmly held. Yes, it is absolute. I am not merely opposed to capital punishment, I categorically exclude, as barbaric and immoral, even the possibility of it.

"However, I could act to find a person guilty of a capital crime, knowing that I will then participate in making him face the sentence of death because of my finding. Furthermore, when I do that, I can remain completely free from any consideration of my opinion that no civilized person would participate in findings that could lead to capital punishment.

"Yes, I could decide the issue of guilt impartially in a capital case. No, I would not be influenced in the slightest to vote against conviction because of my revulsion toward capital punishment. Even though I categorically reject even the possibility of my being a part of a body that imposes the death penalty, and even though I know that my decision on guilt would be an inexorable part of that process in that it would lead to a decision on precisely that immoral and barbaric penalty, I would decide guilt without being influenced at all by my convictions in this regard."

For purposes of argument, amici will concede here that this unusual set of responses might accurately describe the state of mind of a hypothetical person in a venire somewhere. However, the percentage of persons who are accurately so described must be exceedingly small. More importantly, they must be impossible to identify accurately. A set of answers such as those above is far more likely to be the product of poor communication and confusion than to be a true reflection of a given juror's state of mind.

B. *The Sociological Studies Upon Which the Majority Below Relied Do Not Accurately Reflect the Characteristics of These Hypothetical "Absolutely Biased, Yet Simultaneously Unbiased" Venirepersons, and Do Not Demonstrate That They Are an Identifiable or Cognizable Group.*

The court below relied upon a number of sociological studies that purport to show characteristics of persons whom the majority, below, called "Witherspoon excludables." There are a number of reasons why this reliance was inappropriate, some of which are considered below; but most importantly, the studies shed no light upon the hypothetical "absolutely biased, yet simultaneously unbiased" jurors that were allegedly wrongfully excluded. Even Respondent admits that these *Witherspoon* excludables, who are by definition absolutely biased on sentence, can be excluded unless they are free from any influence of that bias on guilt. In fact, given the rarity that must characterize the hypothetical group of "absolutely biased, yet simultaneously unbiased" venire members, it must be said that almost all *Witherspoon* excludables would remain excludable. It is for the sake of a gossamer possibility—that the improbable task of accurately identifying a whole class of these "absolutely biased, yet simultaneously unbiased" jurors could be accomplished—that respondent would visit, upon both the States and upon capital defendants, the disadvantages of the two-jury proposal.

The flaw in this reasoning is, first, that a "cognizable group" should not be drawn for constitutional purposes from such elusive, fine-spun differences in attitude. Respondent's evidence does not remotely begin to show that voir dire examination can accurately measure such complex differences in attitude with the extraordinary degree of precision that would be demanded. Secondly, "cognizable groups" have always been considered to be groups that can be readily identified, rather than those defined by an attitude that ranges across a continuum.¹³ Third, it is inappropriate to prevent trial courts from considering attitudes that are intimately related to the performance of the service of a juror. Evaluating such attitudes does not constitute excluding "cognizable groups," but rather is legitimate jury qualification.

13 See *Duren v. Missouri*, 439 U.S. 357 (1979) (the group alleged to be excluded must be a "distinctive group in the community"), *Castaneda v. Partida*, 430 U.S. 482 (1977) (the group must be a "recognizable," "distinct" class), *Hernandez v. Texas*, 347 U.S. 475, 477-79 (1953) ("[T]hroughout our history differences in race and

III. TO OVERLAY THE *WITHERSPOON-WITT* INQUIRY WITH YET ANOTHER SET OF LEGAL CONCEPTS THAT LAY JURORS MUST UNDERSTAND AND ACCURATELY APPLY TO THEMSELVES WOULD MAKE THE STATES' IMPORTANT INTERESTS IN CONSISTENT AND IMPARTIAL ADJUDICATION OF CAPITAL CASES MORE DIFFICULT TO ACHIEVE.

Application of the *Witherspoon-Witt* distinction, involving persons qualified as impartial on sentence and persons disqualified on sentence, requires great effort in the lower courts. The issue causes confusion and indecision in many venire members. To these categories, as is indicated above, the majority below would add a third: persons who admit to such serious objections against capital punishment that they cannot be qualified (and who know that guilt is a step toward that result), but who nevertheless predict that they can so completely put the issue out of their minds as to be unbiased on guilt or innocence.

As a matter of logic, such a state of mind is theoretically possible. As a matter of practicality, lay persons would generally find it contradictory. It is literally an effort to find jurors who are "biased, yet unbiased." The requirement would dispropor-

color have defined easily identifiable groups . . . ;" group must be "within the community" a "distinct class" and "separate class"). In contrast, the "biased yet unbiased" jurors at issue here are not a distinctive group in the community, are not a separate class, and are not "easily identifiable."

Furthermore, the cases suggest that the existence of invidious discrimination in the larger society is an important factor. *Castaneda*, *supra*, at 478-79 (evidence of discrimination in public facilities in community used to show Mexican-Americans to be "separate" class). No such evidence of invidious discrimination exists here (and it would be extremely unlikely to exist, since the community cannot identify them). The only reason for the exclusion is to obtain a fair trial.

For a thorough discussion of these issues, see Brief of Amici Curiae Oklahoma ex

tionately increase the complexity—and automatically, thereby, reduce the accuracy—of the inquiry. Such biased-yet-unbiased venire members must be both rare and very difficult to identify.

A. *The Straight Witherspoon-Witt Inquiry is Itself Difficult for Many Lay Jurors to Answer With Precision.*

It is unusual that a venireperson comes to the courtroom with an innately formulated position articulated in precise *Witherspoon-Witt* terms, even if he or she is in fact disqualified. Frequently, the initial response of such a potential juror is that he is "against" the death penalty. Such a response may or may not indicate disqualification, and further questioning may be necessary to obtain more precise *Witherspoon-Witt* information.

The result is often equivocation. What the venire member is asked, literally, is whether he would violate the law if seated on the jury. Such an admission is not easily made. The following description was written close to the time of the trial at issue:¹⁴

One must consider the state of mind of a venireperson being interrogated by the court and counsel before the trial of a capital case. Although the judge and lawyers may ardently desire a firm, clear statement from the potential juror that either does or does not conform to the *Witherspoon* test, the juror is frequently unable or unwilling to express a position in precise *Witherspoon* terms. [In some States, the] jurors are questioned individually, under oath, while seated in the witness stand [and in other jurisdictions they answer similarly under oath, while sitting or standing in the view of many other jury panel members]. Interrogation by adversary lawyers ready to analyze every word in the solemn

14 *Crump, Capital Murder: The Issues in Texas*, 14 HOUSTON L. REV. 531, 541-42 (1977). In some of amici States, the two-jury proposal would be especially cumbersome, since individual voir dire of all jurors is allowed in all capital cases, and jury selection can occupy many weeks or even months. *Id.* 546.

atmosphere of a courtroom makes the potential juror answer cautiously. Forcing the juror to adopt the words of the *Witherspoon* test rather than allowing the juror to explain an individual position is distasteful and usually meets with understandable resistance. Furthermore, the potential juror often has not formulated an attitude on such a difficult issue as capital punishment with the precision that the *Witherspoon* test demands. The result is the problem, well known to lawyers in capital cases, of the equivocating venire person. The potential juror may, in effect, refuse to answer the *Witherspoon* question at all, may use his or her own words in expressing a position on the death penalty, or may even change positions several times during the examination within seconds.

The process of adversary questioning increases this phenomenon. Even if a venire member does understand the inquiry completely and accurately, he may have difficulty expressing a clear answer with opposing counsel wording their questions strategically and construing his answers differently. A juror may feel so pressed that he or she simply stops answering questions or is reduced to tears. The appellate decisions reflect such instances,¹⁵ and so does the testimony in this case below.¹⁶

An example of the resulting confusion can be seen in *O'Bryan v. Estelle*, 714 F.2d 365, 379 (5th Cir. 1983), cited

15 E.g., *Granviel v. State*, 665 F.2d 673, 687 (5th Cir. 1981): "The Court: 'Mrs. Wallace, I am sure you do feel very deeply about this. It's brought tears to your eyes, is that right?' Veniwoman Wallace: 'Yes.'" This exchange followed a series of equivocal responses and adversary questioning. See also *Capital Murder*, supra note 14, at 561.

16 See testimony of witness Piazza, R. 1, 643-45 ("You can see a very measured physical response from most people, even the most conservative will have some response; You can tell the breathing, heaving of chest, some folks will tear, some folks won't make any eye contact. It's a very difficult situation for a person to be in.")

in *Witt*, supra, 53 U.S.L.W. at 4112. In the *O'Bryan* case, questioning of some individual jurors occupied up to 40 pages of transcript. The three venire members who were the focus of the Fifth Circuit's review were each asked literally dozens of times in dozens of different ways about their views, in an effort to answer the *Witherspoon-Witt* inquiry. Their answers were repeatedly evasive, contradictory, garbled, and nonresponsive. One, at one point, described himself as a "borderline thinker on the subject." When asked whether he could decide the facts impartially notwithstanding his absolute opposition to the death penalty, this venireman replied:

"I believe I would, as you say as facts, I don't know. Like I say, I would have reservations really regardless of what we consider facts in myself. I mean as far as a personal belief. I wouldn't elaborate to a greater extent, but I would think other than that fact—"

O'Bryan v. Estelle, supra, record at 877. Respondent and the court below would have serious difficulty in applying their criteria for "biased yet unbiased" jurors to real-world venire members such as these.

No criticism of this venireman is intended; these garbled responses are typical of those that the *Witherspoon-Witt* inquiry produces in thoughtful and articulate lay persons called as potential jurors and examined by individual voir dire. But such responses do demonstrate that if capital cases are to be decided with consistency, there is a great need for simplifying and clarifying the inquiry. The least desirable solution would be to make the inquiry more complex by addition of another finely graded category of jurors, defined by yet another set of legal concepts that a venire member must understand and accurately apply to himself.¹⁷

17 In addition, such an approach would be unfair to venirepersons. A greater percentage of hidden nullifiers, not identified either to themselves or to the court, would be erroneously seated on the jury, and it is simply inappropriate for a society to forcibly require

B. *A Statement of Bias Against Sentence But Impartiality on Guilt-Innocence is Only a Prediction of the Venire Member's Future Behavior Under Conditions That he Can Only Imagine. The Likelihood That Such a Prediction Will be the Product of Poor Communication, Confusion, or Overestimation of His Capacity for Impartiality is Increased by the Complexity of the Inquiry Mandated Below.*

Even if a venire member happens to make a statement of bias against sentence but impartiality on guilt-innocence, the statement remains only a prediction of the juror's future behavior under the conditions of trial and deliberation, which the venire member can only imagine.¹⁸ The likelihood that such a prediction will be the product of poor communication, confusion, or overestimation by the veniremember of his own capacity for impartiality, increases with the complexity of the inquiry the majority below thus has mandated. Erroneous categorization, in turn, increases the difficulty of attaining even-handed, consistent determination of capital cases.

To these concerns must be added the possibility of direct frustration of the guilt-innocence determination. Several courts have raised the possibility that persons absolutely opposed to capital punishment might consider it their duty to serve on the jury at the guilt stage, and, while doing so, might consider it their further duty to vote so as to prevent the morally repugnant

such persons to adjudicate capital crimes in heinous cases. These individuals would likely be faced with the moral imperative simultaneously to convict and to acquit. Our society does occasionally force citizens to undertake obligations to which they have deeply felt conscientious objections, but there are strong reasons against doing so.

¹⁸ Deliberations in a capital case, as well as consideration of the evidence in such a case, present an experience not remotely related to experiences that most jurors have had in the past. Most can only estimate their performance in such conditions. The prediction of absence of guilt bias by a sentence-biased juror remains only that—a prediction—and it is based on the juror's guess about the events he will encounter.

outcome of capital punishment—i.e., to vote against conviction irrespective of the evidence. One judge in *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983), referred to such a person perjoratively as the "lying" juror. *Id.* at 406 (Buchmeyer, J., dissenting). While deliberate falsification might occur, the more likely possibility is that a venireperson would have simply overestimated the capacity of his or her mind impartially to decide solely on the basis of the evidence, in disregard of the consequences.¹⁹

Thus in *Spinkellink v. Wainwright*, 578 F.2d 582, 595-96 (1978), the Fifth Circuit said:

... Florida apparently has concluded that, if for whatever noble reason—religious conviction, philosophical posture, intellectual stance, or some other reason—a venireman clings so steadfastly to the belief that capital punishment is wrong that he would never under any circumstances agree to recommend the sentence of death, it is entirely possible—perhaps even probable—that such a person could not fairly judge a defendant's guilt or innocence when a capital felony is charged A juror who had such deeply-seated conscientious scruples against the death penalty might find himself confronting a grisly choice. If, because of his scruples, he votes to acquit, he must risk hanging the jury. Similarly motivated votes by other jurors in subsequent trials and retrials could, in effect result in near immunity from crimes for which the death penalty can be imposed, which would frustrate Florida's interest in the just and evenhanded application of its laws, including its death penalty statute. If the juror votes to convict, he must risk betrayal of his principles should the death penalty eventually be imposed

¹⁹ The testimony below discloses cases in which precisely this result has occurred. R. 1644-45 (witness Piazza) (discussion of instances in which jurors found, in having to decide capital cases, that they had overestimated their capacity to do so free of bias.)

. . . [I]mpartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution Florida has reasoned that a person may so cherish his conscientious scruples against the death penalty that he would favor the acquittal of a defendant charged with a capital felony

There are some states of mind that make impartiality so difficult that the law is justified in treating it as unattainable. Thus, for example, if a defendant's brother were a member of the venire, he could be excluded even if he stated that he could decide guilt with total impartiality; the moral and emotional effect of family membership would overcome the facile prediction of impartiality in such a case. It is not unreasonable for a State to conclude that absolute, conscientious rejection of capital punishment in a capital case is similar.²⁰

A number of other courts have decided similarly to *Spinkellink*. See, e.g., *United States v. Puff*, 211 F.2d 171 (2d Cir. 1954) (concern that jury including such hidden, unknown nullifiers would be "in reality a 'partisan jury'"); *Andrews v. United States*, 333 U.S. 740, 766 (1948) (Frankfurter, J., concurring) (possibility that such a juror "can hang the jury if he cannot have his way").

C. *The Result Reached by the Majority Below Would Make Consistency in Capital Sentencing More Difficult to Achieve.*

Respondent's answer to all of these arguments is that the state may exclude jurors who cannot be "fair and impartial," and that the State can identify them through "searching voir dire."

²⁰ People are commonly excludable if they cannot read or write, have been convicted of felony, or are under eighteen (or twenty-one) years of age. It is likely that there is some attitudinal difference between these groups and the group of qualified jurors, but that difference has never been thought to invalidate the disqualification.

Memorandum in Response to Petition for Certiorari at 6 (type-written version). This argument misses the point. As the lengthy, garbled inquiries in *O'Bryan*, *supra*, demonstrate, accurate predictions or estimations about which venire members hold or do not hold the "biased yet unbiased" state of mind at issue would be a practical impossibility.

Because the two-jury proposal thus assumes a degree of precision in the *Witherspoon-Witt* inquiry that is impractical to attain, it would contribute significantly to inconsistency in capital cases. It would mean more exacting review of less precise information on appeal and habeas corpus, with more consequent reversals unrelated to the merits. As a result, judges would be more likely to accept jurors who are absolutely opposed to capital punishment but who have given equivocal answers on impartiality in the guilt-innocence trial, and who are in fact nullifiers. Outcomes thus might well become more dependent upon the process of jury selection than upon the strength of evidence, the defendant's record, or the atrocity of the murder. Thus the "two-jury" proposal would "frustrate the state's interest in just and evenhanded application of its laws," *Spinkellink v. Wainwright*, *supra*, 578 F.2d at 596, and would lead to the very problem of inaccurate sentencing condemned by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976).

IV. FINDINGS ABOUT SOCIAL SCIENTISTS' OPINIONS FROM A CONFLICTING RECORD SHOULD NOT BE ENACTED INTO POSITIVE CONSTITUTIONAL LAW BY THE DECISION OF A SINGLE TRIAL JUDGE CONSIDERING NATIONWIDE "LEGISLATIVE" FACTS.

The evidence in the trial court presented by Respondent consisted largely of studies by statisticians and sociologists. The evidence was hotly contested, and it is contradicted.²¹ Such evi-

²¹ See *infra* note 23 and accompanying text.

dence can be useful and indeed persuasive in some cases, particularly when it determines "adjudicative" facts directly and clearly; however, when it consists of inquiries that are related inferentially to the behavior at issue, and it affects "legislative" facts (or facts underlying the interpretation of law), it should be considered with more caution. A single district judge²² should not be required to decide upon interpretations of "facts" of this kind, in a case in which conflicting evidence would support a wide variety of inferences, and thereby to bind the entire nation to a result that dispenses on constitutional grounds with procedures of long duration.

A. The Evidence Does Not Justify the Sweeping Nationwide Inferences Made Below.

As Arkansas has argued, behavior of jurors deciding death penalty cases in fact is certain to be different from that of subjects responding to attitudinal surveys or simulations. The court below concluded that "We should not now reject a study because of this deficiency." Slip op. at 21. This reasoning presents a great risk that erroneous conclusions might be set in the concrete of a constitutional holding.

The conclusions are, in fact, impeached and contradicted on the record. For example, evidence that capital case juries are allegedly more "conviction prone" is squarely contradicted by

²² As Arkansas has argued, the decision below is in conflict with other final decisions of courts of appeals and state courts of last resort. *Smith v. Balkcom*, 660 F.2d 573, modified, 671 F.2d 858 (5th Cir. 1981); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978); *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984); *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc); *Watson v. Blackburn*, 756 F.2d 1055 (5th Cir. 1985); *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 104 S.Ct. 2369 (1984). In fact, the decision conflicts with every other such decision. In some such cases, e.g., *Spinkellink*, supra, there was contested sociological evidence, but the courts' findings were opposite from those made by the district court here. In such circumstances, it would be ironic if the findings below were to bind the nation.

observations that juries in capital cases are actually more acquittal prone than juries in non-capital cases.²³ This evidence, consisting of testimony of attorneys experienced in capital trials, provides direct evidence that the State's burden of proof in capital cases is *de facto* higher, not lower, than in other cases. Thus direct empirical evidence in the record, to the extent that it exists, shows quite squarely that the inferences made from sociological surveys and simulations are wrong.

Furthermore, the overlooking of admitted "deficiencies" is a dangerous approach to sociological evidence.^{23a} As one author has said, "persistent" errors result from the use of sociological evidence in court because

statisticians do not have to deal with burden of proof, and hence bury in their use of regression assumptions that a lawyer would challenge were he or she more keenly aware of them; and, conversely, . . . attorneys do not have to deal with the statistical concept of a "null hypothesis." . . .

²³ E.g., Record at 1643-45.

It may well be that this conventional wisdom is recognized by virtually all attorneys experienced in capital cases. In general, it would seem most inadvisable for an attorney for the State to charge a capital crime if the evidence presents doubts of any significance. *Id.* As this record evidence shows, the empirically observed result is that, in doing so, he increases the real burden of proof, because jurors expect to see very convincing evidence in capital cases. Cf. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 443 n. 18 (1966) (documenting jury acceptance in ordinary homicide cases of theories of proof, such as felony-murder, that juries reject in capital cases).

^{23a} For an excellent analysis of the appropriate role of social science in legal analysis, see *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), Slip op. at 20-26. The judges in *McCleskey* unanimously rejected the argument made here by Respondent. See also Sperlich, *Social Science Evidence and the Courts: Reaching beyond the Advisory Process*, 63 JUDICATURE 280, 283 n. 14 (1980); O'Brien, *The Seduction of the Judiciary*, 64 JUDICATURE 8, 19 (1980).

In death penalty cases, "If social science cannot produce the required answers, and it probably cannot, its use is likely to con-

Campbell, *Regression and Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299, 1301-02, 03 (1984).^{23b} Sociological or statistical studies generally must begin with the construction of a "model," which may reflect the investigator's prejudices or preconceptions. For this reason, statistical evidence is more appropriate for disproving than for proving propositions. Finally, "it is entirely acceptable within economics and other social sciences, to use a model to help explain observed behavior where no other model works better, even though in an absolute sense, the model does not prescribe the data very well at all." However, "this cannot be the attitude . . . for proof of legal propositions." *Id.*

In particular, had the court considered the number and characteristics of "absolutely biased on sentence, yet unbiased on guilt" venire members, rather than the total number of *Witherspoon* excludables, it might well have reached a different conclu-

tinue to lead to a disjointed incrementalism." Daniels, *Social Science and Death Penalty Cases*, 1 L. & POL'Y Q. 336, 367 (1979). "Social science can probably make its greatest contribution to legal theory by investigating the causal forces behind judicial, legislative and administrative decisionmaking and by probing the general effects of such decisions." Nagel, *Law and the Social Sciences: What Can Social Science Contribute?* 356 A.B.A.J. 356, 357-58 (1965).

^{23b} See also *Presseisen v. Swarthmore College*, 442 F.Supp. 593, 619 (E.D. Pa. 1977) (in which court accepted demonstration that expert in statistics could not give meaningful opinions without expert knowledge of college faculty salaries in a case concerning college; "perhaps the only conclusions that one can reach, on the basis of the above-described testimony, is that it is almost impossible in the fact situation that the court is presented with, to measure the differences in salaries between men and women by statistical analysis"); *Wilkins v. University of Houston*, 654 F.2d 388, 410 (5th Cir. 1981) ("[T]he day is long past . . . when we proceed with any confidence toward broad conclusions from crude and incomplete statistics. That everyone who has eaten bread has died may tell us something about bread, but not very much"); See also *EEOC v. Fed. Reserve Bank of Richmond*, 698 F.2d 633, 656-57 (4th Cir. 1983) (collecting cases involving judicial rejection of statistical conclusions).

sion, since most of the latter would be excluded even under the lower court's own approach. In this regard, the majority below erroneously upheld the district court's findings "that the [*Witherspoon* excludable] group is . . . between eleven percent and seventeen percent of those eligible for jury service. So the group excluded as both distinct and sizeable." Slip op. at 8. If the court had confined its findings to the group really at issue, namely those individuals who are "biased yet unbiased," it would necessarily have found either that they were impossible to identify or that they were a considerably smaller entity.

Furthermore, these "biased yet unbiased" jurors, if separated with the accuracy demanded by respondents through actual voir dire examination in a "searching" manner, would have characteristics that are wholly undetermined by the evidence. Presumably, if such a person were accurately identified (an individual, that is, who actually absolutely rejected capital punishment, but could absolutely set aside that firmly held principle in deciding guilt) the inference remains that he must be capable of disregarding human considerations that would otherwise restrain jurors in a death penalty case. Such a juror might well be conviction-prone in the extreme.

B. *Single-Judge Fact Findings on Sociological Evidence Cannot Resolve Ultimate Constitutional Issues.*

The majority below has invalidated a system for capital sentencing that has been in use for many years. In *Marsh v. Chambers*, 103 S.Ct. 3330 (1983), the "legislative chaplain" case, this court held that a "practice [that] has continued without interruptions ever since [the earliest] session of Congress" did not violate the first amendment. *Id.* at 3334. No State requires, and none has ever required, the cumbersome approach that the majority below mandated for every capital case involving jury sentencing. That impractical approach was not in use when the constitutional provision here at issue was adopted, and those who drafted it would be surprised to learn that they had thereby destroyed the traditional role of juries in capital cases.

Civil libertarians have frequently expressed strong reserva-

tions about the use of social science to resolve legal questions. Part of the reason is that

[S]ocial science, despite its name, is not scientific the way other sciences are. Its claim to be a science is relatively harmless until it begins to interfere in the real processes of human life as though it had the same scientific certainty as physics and chemistry and biology. Quite simply, the predictive and variance-explaining powers of social science models that are other than definitions is appallingly low.

Greely, *Justice: Debunking the Role of Social Scientists in Court*, HUMAN RIGHTS: JOURNAL OF THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES OF THE AMERICAN BAR ASSOCIATION 34, 35 (1978).

Sociological studies have proved to be inadequate bases for constitutional decisionmaking even when they have been strong and consistent. For example, the absence of a deterrence effect in capital punishment was "demonstrated" by numerous studies prior to the work of Isaac Erlich. Erlich then showed that, in fact, such a deterrent effect could be computed mathematically from regression models (but Erlich, a careful sociologist, pointed out that neither deterrence nor nondeterrence could be "demonstrated").²⁴ Similarly, lawyers using sociological evidence often protest that probabilities of future conduct cannot be predicted; nevertheless, this Court has repeatedly recognized that determinations of such probabilities must be made in such common judicial functions as bail determinations, sentencing, and juvenile detention.²⁵

²⁴ See *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976), citing Erlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM.ECON.REV. 397 (June 1975).

²⁵ E.g., *Schall v. Martin* 104 S. Ct. 2403 (1984) (strongly stated sociological testimony, including that of respected sociologist Leslie T. Wilkins, did not justify holding New York's "risk" standard for juvenile detention unconstitutional); *Jurek v. Texas*, 96 S. Ct. 2950 (1976) (probability of future violence is a proper consideration in capital sentencing notwithstanding alleged evidence from social scientists that such predictions are impossible).

One basic problem with enacting sociological evidence into positive constitutional law is that it does not provide any guide for weighing considerations outside the idiosyncratic sociological model in question. See, e.g., *Mayor v. Educational Equality League*, 415 U.S. 605, 615 (1974) (court of appeals' recognition of prima facie case, based upon sociological and statistical evidence, held, reversed, because it "did not assign appropriate weight to the constitutional considerations raised by the Mayor"); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (although statistical and sociological evidence accepted, acceptance must be limited, because it did not address "the legitimate expectations of non-victim employees," for which the court must draw on "qualities of . . . practicality"). Similarly, the holding of the courts below demonstrates the dangers of excessive reliance upon a single judge's findings about sociological opinion, because, in enacting those opinions directly into constitutional law, the majority below failed to give any weight to the disadvantages it thereby created for capital defendants, the difficulty of identifying the rare "biased yet unbiased" juror, the inducement it thereby provided for the abandonment of juries in favor of judge sentencing, and the constitutional inappropriateness of invalidating a procedure used when the very constitutional provision at issue was adopted.

This Court has repeatedly held that findings of fact by a single district judge are not controlling on constitutional questions.²⁶ The present case is really about ultimate questions of federalism. In *Baumgartner v. United States*, 322 U.S. 665, 670 (1943), this Court said:

²⁶ E.g., *Neil v. Biggers*, 409 U.S. 188 (1971) (fact findings rejected where "the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them"); *Derenyi v. Immigration Service*, 385 U.S. 630, 636 (1967) (court is not bound by fact findings "when constitutional claims may depend upon their resolution"); *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 153 (1951) ("questions of general importance" cannot be controlled by "resolving conflicting testimony").

The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment. Such a finding of fact may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses Findings on so called ultimate "facts" more clearly imply the application of standards of law *Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship.*

As in *Baumgartner*, the present case clearly involves "judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship," rather than discrete fact findings.

Respondent makes the offhand accusation that amici curiae "desire to denigrate all social scientific evidence." Response to Petition for Certiorari at 8. This accusation is as inappropriate as it is unsupported. The studies at issue would be of appropriate interest to legislators. So would the conflicting considerations. Courts may benefit from use of sociological or statistical evidence in adjudication. However, the sociological opinions in question, or findings or evidence either consistent or contrary to them, are not the substance of constitutional law.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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JOSEPH E. SPANIEL, JR.
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No. 84-1865

In the Supreme Court of the United States

OCTOBER TERM, 1985

A. L. LOCKHART,

Petitioner,

vs.

ARDIA V. McCREE,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**BRIEF OF AMICI CURIAE,
ARIZONA, CALIFORNIA, DELAWARE, KENTUCKY,
LOUISIANA, MARYLAND, NEBRASKA, NEVADA,
NEW HAMPSHIRE, OHIO, OKLAHOMA,
PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE,
UTAH, VIRGINIA, and WYOMING***

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TABLE OF CONTENTS

	PAGE
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT:	
The exclusion from juries in capital cases of persons who are unwilling to consider all of the penalties provided by state law, and who are irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings, does not violate a defendant's right to a jury composed of a representative cross-section of the community	3
CONCLUSION	12

—ii—

TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Adams v. Texas</i> , 448 U.S. 38 (1980)	7
<i>Ake v. Oklahoma</i> , 105 S.Ct. 1087 (1985)	5
<i>Banks v. State</i> , 701 P.2d 418 (Okla.Crim.App. 1985)	5
<i>Bass v. State</i> , 622 S.W.2d 101 (Tex.Crim.App. 1981)	9
<i>Bloxham v. State</i> , 600 P.2d 341 (Okla.Crim.App. 1979)	5
<i>Boulden v. Holman</i> , 394 U.S. 478 (1969)	6
<i>Briley v. Booker</i> , 594 F.Supp. 1399 (E.D. Va. 1984)	7
<i>Burris v. State</i> , 465 N.E.2d 171 (Ind. 1984)	8
<i>Castaneda v. Partida</i> , 430 U.S. 482 (1977)	9
<i>Chadterson v. State</i> , 54 Md.App. 86, 456 A.2d 1313 (1983), cert. dism'd, 298 Md.App. 421, 470 A.2d 1269 (1984)	8
<i>Chaney v. State</i> , 612 P.2d 269 (Okla.Crim.App. 1980), remanded in part, sub nom. <i>Chaney v. Brown</i> , 730 F.2d 1334 (10th Cir. 1984), cert. den., 105 S.Ct. 601 (1984), 699 P.2d 159 (Okla.Crim.App. 1985)	5
<i>Coleman v. Brown</i> , No. 85-1094 (10th Cir. Oct. 18, 1985)	5
<i>Coleman v. State</i> , 668 P.2d 1126 (Okla.Crim.App. 1983)	5, 9
<i>Commonwealth v. Morales</i> , Pa., 494 A.2d 367 (1985)	9
<i>Corn v. Zant</i> , 708 F.2d 549 (11th Cir. 1983)	7
<i>Cox v. Montgomery</i> , 718 F.2d 1036 (11th Cir. 1983)	10
<i>Davis v. Georgia</i> , 429 U.S. 122 (1976)	4
<i>Davis v. Greer</i> , 675 F.2d 141 (7th Cir. 1982)	10
<i>DuFour v. State</i> , 453 So.2d 337 (Miss. 1984)	8
<i>Dunkins v. State</i> , 437 So.2d 1349 (Ala. 1983)	8
<i>Duren v. Missouri</i> , 439 U.S. 357 (1979)	9, 11
<i>Dutton v. State</i> , 674 P.2d 1134 (Okla.Crim.App. 1984)	5

—iii—

AUTHORITIES CONTINUED

<i>Edwards v. Thigpen</i> , 595 F.Supp. 1271 (S.D. Miss. 1984)	7
<i>Felder v. Estelle</i> , 588 F.Supp. 664 (S.D. Tex. 1984)	7
<i>Flynn v. Holbrook</i> , 581 F.Supp. 990 (D.R.I. 1984)	10
<i>Griffin v. Wainwright</i> , 588 F.Supp. 1549 (M.D. Fla. 1984)	7
<i>Grigsby v. Mabry</i> , 758 F.2d 226 (8th Cir. 1985)	3, 6, 10
<i>Hagar v. State</i> , 665 P.2d 319 (Okla.Crim.App. 1983)	5
<i>Hooks v. State</i> , 416 A.2d 189 (Del. 1980)	8
<i>Hutchins v. Woodard</i> , 730 F.2d 953 (4th Cir. 1984)	7
<i>Johnson v. Kemp</i> , 585 F.Supp. 1496 (S.D. Ga. 1984)	7-8
<i>Keeten v. Garrison</i> , 742 F.2d 129 (4th Cir. 1984)	7
<i>Liles v. State</i> , 702 P.2d 1025 (Okla.Crim.App. 1985)	5
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	6
<i>Martin v. Blackburn</i> , 521 F.Supp. 685 (E.D. La. 1981), aff'd, 711 F.2d 1273 (5th Cir. 1983)	8
<i>Matheson v. King</i> , 751 F.2d 1432 (5th Cir. 1985)	7
<i>McClesky v. Kemp</i> , 753 F.2d 877 (11th Cir. 1985)	7
<i>McKenna v. State</i> , 705 P.2d 614 (Nev. 1985)	8
<i>Mitchell v. Hopper</i> , 538 F.Supp. 77 (S.D. Ga. 1982)	8
<i>Mincey v. State</i> , 251 Ga. 255, 304 S.E.2d 882 (1983)	8
<i>Murphy v. Florida</i> , 421 U.S. 794 (1975)	11
<i>Parks v. State</i> , 651 P.2d 686 (Okla.Crim.App. 1982)	5
<i>People v. Collins</i> , 106 Ill.2d 237, 478 N.E.2d 267 (1985)	8
<i>People v. Jackson</i> , 28 Cal.3d 264, 618 P.2d 149 (1980)	8
<i>Peters v. Kiff</i> , 407 U.S. 493 (1972)	9
<i>Prejean v. Blackburn</i> , 570 F.Supp. 985 (W.D. La. 1983) aff'd, 743 F.2d 1091 (5th Cir. 1984)	8, 10
<i>Pitts v. Lockhart</i> , 753 F.2d 689 (8th Cir. 1985)	6

AUTHORITIES CONTINUED

PAGE(S)

<i>Rector v. State</i> , 280 Ark. 385, 659 S.W.2d 168 (1983) —	8
<i>Rowan v. Owens</i> , 752 F.2d 1186 (7th Cir. 1984) —	7
<i>Sonnier v. Maggio</i> , 720 F.2d 401 (5th Cir. 1983) —	7
<i>Spencer v. Zant</i> , 715 F.2d 1562 (11th Cir. 1983) —	7
<i>Spinkellink v. Wainwright</i> , 578 F.2d 582 (5th Cir. 1978) —	7
<i>Stafford v. State</i> , 669 P.2d 285 (Okla.Crim.App. 1983), vacated, 104 S.Ct. 2652 (1984), aff'd, 697 P.2d 165 (Okla.Crim.App. 1985), cert. den., 105 S.Ct. 3537 (1985) —	5
<i>Stafford v. State</i> , 665 P.2d 1205 (Okla.Crim.App. 1983) vacated, 104 S.Ct. 2651 (1984), aff'd, 700 P.2d 223 (Okla.Crim.App. 1985), cert. denied, 106 S.Ct. 188 (1985) —	5
<i>Stamper v. Commonwealth</i> , 220 Va. 260, 257 S.E.2d 808 (1979) —	9
<i>State v. Anderson</i> , 207 Neb. 51, 296 N.W.2d 440 (1980) —	8
<i>State v. Fisher</i> , 141 Ariz. 227, 686 P.2d 750 (1984) —	8
<i>State v. Guinan</i> , 665 S.W.2d 325 (Mo. 1984) —	8
<i>State ex rel. Hopkinson v. District Court, Teton Co.</i> , 696 P.2d 54 (Wyo. 1985) —	9
<i>State v. Jenkins</i> , 15 OhioSt.3d 164, 473 N.E.2d 264 (1984) —	9
<i>State v. McKay</i> , 680 S.W.2d 447 (Tenn. 1984) —	9
<i>State v. Norton</i> , 675 P.2d 577 (Utah 1983) —	9
<i>State v. Prejean</i> , 379 So.2d 240 (La. 1979) —	8
<i>State v. Rupe</i> , 101 Wash.2d 664, 683 P.2d 571 (1984) —	9
<i>State v. Simonson</i> , 100 N.M. 297, 669 P.2d 1092 (1983) —	8
<i>State v. Skipper</i> , 328 S.E.2d 58 (S.C. 1985) —	9
<i>State v. Young</i> , — N.C. —, 325 S.E.2d 181 (1985) —	8
<i>United States ex rel. Clark v. Fite</i> , 538 F.2d 750 (7th Cir. 1976) —	7
<i>United States v. Daly</i> , 573 F.Supp. 788 (N.D. Tex. 1983) —	10

AUTHORITIES CONTINUED

PAGE(S)

<i>United States v. Duran De Amesquita</i> , 582 F.Supp. 1326 (S.D. Fla. 1984) —	10
<i>United States v. Gometz</i> , 730 F.2d 475 (7th Cir. 1984) —	10
<i>United States v. Jones</i> , 728 F.2d 115 (2d Cir. 1984) —	9-10
<i>United States v. Test</i> , 550 F.2d 577 (10th Cir. 1976) —	10
<i>United States v. Yazzie</i> , 660 F.2d 422 (10th Cir. 1981) —	9
<i>Wainwright v. Witt</i> , 105 S.Ct. 844 (1985) —	7-8
<i>Watson v. Blackburn</i> , 756 F.2d 1055 (5th Cir. 1985) —	7
<i>White v. Commonwealth</i> , 671 S.W.2d 241 (Ky. 1984) —	8
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968) —	6, 8
<i>Witt v. State</i> , 465 So.2d 510 (Fla. 1985) —	8
<i>Woodard v. Sargent</i> , 753 F.2d 694 (8th Cir. 1985) —	6

Statutes

Ala. Code § 13A-5-47 (Supp. 1984) —	3
Ark. Stat. Ann. § 41-1301 (1977) —	3
Cal. Penal Code § 190.3 (West Supp. 1985) —	3
Colo. Rev. Stat. § 16-11-103 (Supp. 1984) —	3
Conn. Gen. Stat. § 53a-46a (1985) —	3
Fla. Stat. Ann. § 921.141 (West 1985) —	3
Del. Code Ann. tit. 11, § 4209 (Supp. 1984) —	3
Ga. Code Ann. § 17-10-31 (1982) —	3
Ill. Ann. Stat. ch. 38, § 9-1 (Smith-Hurd, Supp. 1985) —	3
Ind. Code Ann. § 35-50-2-9 (Burns 1985) —	3
Ky. Rev. Stat. Ann. § 532.025 (Baldwin 1983) —	3
La. Code Crim. Proc. Ann. art. 905.6 (West 1984) —	3
Md. Ann. Code art. 27, § 413 (1982) —	3
Miss. Code Ann. § 99-19-101 (Supp. 1985) —	3-4
Mo. Ann. Stat. § 565.030 (Vernon Supp. 1985) —	4
Nev. Rev. Stat. § 175.552 (1981) —	4
N.H. Rev. Stat. Ann. § 630.5 (Supp. 1983) —	4
N.J. Stat. Ann. § 2C:11-3 (West 1982) —	4

AUTHORITIES CONTINUED

PAGE(S)

N.M. Stat. Ann. § 31-20A-3 (1981)	4
N.C. Gen. Stat. § 15A-2002 (1983)	4
Ohio Rev. Code Ann. § 2929.03 (Page 1982)	4
Okla. Stat. Ann. tit. 21, § 701.10 (West 1983)	4
1985 Or. Laws ch. 3	4
42 Pa. Cons. Stat. Ann. § 9711 (Purdon 1982)	4
S.D. Codified Laws Ann. § 23A-27A-4 (1979)	4
S.C. Code Ann. § 16-3-20 (Law. Co-op. Supp. 1983)	4
Tenn. Code Ann. § 39-2-203 (1982)	4
Tex. Stat. Ann. art. 37-071 (Vernon 1981 & Supp. 1985)	4
Utah Code Ann. § 76-3-207 (Supp. 1985)	4
Vt. Stat. Ann. tit. 13 § 2303(c) (Supp. 1985)	4
Va. Code § 19.2-264.4 (1983)	4
Wash. Rev. Code Ann. § 10-95.080 (Supp. 1986)	4
Wyo. Stat. § 6-4-102 (1977 and Supp. 1982)	4

Miscellaneous

Death Row U.S.A., NAACP Legal Defense and Educational Fund (Oct. 1, 1985)	4
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No. 84-1865

In the
Supreme Court of the United States

OCTOBER TERM, 1985

A. L. LOCKHART,

Petitioner,

vs.

ARDIA V. McCREE,

Respondent.

**BRIEF OF AMICI CURIAE
IN SUPPORT OF THE PETITIONER**

INTEREST OF AMICI CURIAE

The amici curiae are States whose capital sentencing statutes or procedures will be affected or who have numerous criminal defendants whose convictions will be reversed if this Court upholds the Eighth Circuit's decision in this case.

The amici submit this brief through their Attorneys General pursuant to Sup.Ct.R. 36.4. This brief is presented in support of the Petitioner A. L. Lockhart.

SUMMARY OF ARGUMENT

Thirty-three of the thirty-seven States that have capital punishment use either jury sentencing, or a procedure where the jury recommends punishment. In these States, many of the convictions of defendants on death row, and the convictions of those persons serving lesser sentences in

cases where juries were selected by excluding Witherspoon Excludables (WEs), will be reversed if the *Grigsby* decision is upheld by this Court.

Previous decisions of this Court support the procedure used by States in which prospective jurors in a capital case are excused for cause if they state before the trial has begun that they are unwilling to consider all of the penalties provided by law, and would vote against the death penalty regardless of the facts and circumstances that might emerge. A State is entitled to a jury comprised of citizens who are willing to consider all statutory punishment options.

No appellate court other than the Eighth Circuit has held that the exclusion of WEs violates a defendant's rights under the United States Constitution. At the present time four circuit courts of appeal and appellate courts in twenty-nine states have rejected the argument adopted by the court in *Grigsby*.

Furthermore, if this Court finds that persons who are opposed to the death penalty in all cases constitute a cognizable group which, if excluded, denies a criminal defendant the right to be tried by a representative cross-section of the community, there would be no limit as to what could be defined as a class. Defendants in criminal cases will be able to claim that other groups which are excluded from jury service, such as non-voters, mobile persons, young people, or aliens, constitute a cognizable class, especially if public opinion polls, mock trial experiments, and sociological studies reveal that these groups are "defendant-prone."

ARGUMENT

THE EXCLUSION FROM JURIES IN CAPITAL CASES OF PERSONS WHO ARE UNWILLING TO CONSIDER ALL OF THE PENALTIES PROVIDED BY STATE LAW, AND WHO ARE IRREVOCABLY COMMITTED, BEFORE THE TRIAL HAS BEGUN, TO VOTE AGAINST THE PENALTY OF DEATH REGARDLESS OF THE FACTS AND CIRCUMSTANCES THAT MIGHT EMERGE IN THE COURSE OF THE PROCEEDINGS, DOES NOT VIOLATE A DEFENDANT'S RIGHT TO A JURY COMPOSED OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

The amici contend that the United States Court of Appeals for the Eighth Circuit in *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), was in error when it held that a State is prohibited by the Fourteenth Amendment from excluding persons from juries in capital cases who state, before the trial has begun, that they would vote against the penalty of death regardless of the facts and circumstances that might emerge during the trial.

Of the thirty-seven States that have the death penalty, thirty-three provide for sentencing by juries in capital cases or have a procedure in which the jury recommends the punishment to the judge.¹ Many of these States follow the

¹ Ala. Code § 13A-5-47 (Supp. 1984); Ark. Stat. Ann. § 41-1301 (1977); Cal. Penal Code § 190.3 (West Supp. 1985); Colo. Rev. Stat. § 16-11-103 (Supp. 1984); Conn. Gen. Stat. § 53a-46a (1985); Del. Code Ann. tit. 11, § 4209 (Supp. 1984); Fla. Stat. Ann. § 921.141 (West 1985); Ga. Code Ann. § 17-10-31 (1982); Ill. Ann. Stat. ch. 38, § 9-1 (Smith-Hurd, Supp. 1985); Ind. Code Ann. § 35-50-2-9 (Burns 1985); Ky. Rev. Stat. Ann. § 532.025 (Baldwin 1983); La. Code Crim. Proc. Ann. art. 905.6 (West 1984); Md. Ann. Code art. 27, § 413 (1982); Miss.

practice in capital cases of excluding prospective jurors who state during voir dire that they would vote against the death penalty regardless of the evidence.

The thirty-three States which have jury sentencing or have a jury recommend sentencing in capital cases have custody of 1395 of the 1590 persons on death row as of October 1, 1985.² Therefore, if the principles of *Grigsby* are followed by this Court, it would have a devastating impact on the efforts to impose the death penalty in this country.³

For example, a review by the Oklahoma Attorney General's Office of the convictions of the fifty-six persons on

¹ (Continued)

Code Ann. § 99-19-101 (Supp. 1985); Mo. Ann. Stat. § 565.030 (Vernon Supp. 1985); Nev. Rev. Stat. § 175.552 (1981); N.H. Rev. Stat. Ann. § 630:5 (Supp. 1983); N.J. Stat. Ann. § 2C:11-3 (West 1982); N.M. Stat. Ann. § 31-20A-3 (1981); N.C. Gen. Stat. § 15A-2002 (1983); Ohio Rev. Code Ann. § 2929.03 (Page 1982); Okla. Stat. Ann. tit. 21, § 701.10 (West 1983); 1985 Or. Laws ch. 3; 42 Pa. Cons. Stat. Ann. § 9711 (Purdon 1982); S.D. Codified Laws Ann. § 23A-27A-4 (1979); S.C. Code Ann. § 16-3-20 (Law. Co-op. Supp. 1983); Tenn. Code Ann. § 39-2-203 (1982); Tex. Stat. Ann. art. 37-071 (Vernon 1981 & Supp. 1985); Utah Code Ann. § 76-3-207 (Supp. 1985); Vt. Stat. Ann. tit. 13 § 2303 (c) (Supp. 1985); Va. Code § 19.2-264.4 (1983); Wash. Rev. Code Ann. § 10-95.080 (Supp. 1986); Wyo. Stat. § 6-4-102 (1977 and Supp. 1982).

² Death Row U.S.A., NAACP Legal Defense and Educational Fund (Oct. 1, 1985).

³ In *Davis v. Georgia*, 429 U.S. 122 (1976), this Court held that the exclusion of only one prospective juror in violation of *Witherspoon* principles required the retrial of the defendant. The amici assumed, therefore, that exclusion of one prospective juror in violation of the *Grigsby* principles would compel the same result.

death row in Oklahoma reveal that many of those cases would probably be reversed.⁴

Since in Oklahoma, federal constitutional errors are "fundamental", this ground is preserved in all pending capital cases where it is applicable. See *Ake v. Oklahoma*, 105 S.Ct. 1087, 1092-93 (1985).

Furthermore, there are countless convictions in cases in which Oklahoma attempted to obtain the death penalty, but the jury imposed a life sentence or a lesser included offense. See e.g., *Hager v. State*, 665 P.2d 319, 322-23 (Okla. Crim.App. 1983); *Chaney v. State*, 612 P.2d 269, 274 (Okla. Crim.App. 1980), remanded in part, sub. non. *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984), cert. denied, 105 S.Ct. 601 (1984), 699 P.2d 159 (Okla.Crim.App. 1985); *Bloxham v. State*, 600 P.2d 341, 343 (Okla.Crim.App. 1979).

⁴ Among the cases which would require retrial are those of Roger Dale Stafford, who has been convicted of murdering nine persons during two separate robberies. *Stafford v. State*, 669 P.2d 285, 291 (Okla.Crim.App. 1983), vacated, 104 S.Ct. 2652 (1984), aff'd, 697 P.2d 165 (Okla. Crim.App. 1985), cert. denied, 105 S.Ct. 3537 (1985); and *Stafford v. State*, 665 P.2d 1205, 1213 (Okla.Crim.App. 1983), vacated, 104 S.Ct. 2651 (1984), aff'd, 700 P.2d 223 (Okla.Crim.App. 1985), cert. denied, 106 S.Ct. 188 (1985). See also *Coleman v. State*, 668 P.2d 1126, 1137 (Okla.Crim.App. 1983), a case pending before the United States Court of Appeals for the Tenth Circuit, sub nom. *Coleman v. Brown*, No. 85-1094. On October 18, 1985, the Tenth Circuit issued an order stating that it was abating further consideration of this appeal until this Court issues its decision in the present case.

Representative of other cases which would be reversed are *Liles v. State*, 702 P.2d 1025, 1035 (Okla.Crim.App. 1985); *Banks v. State*, 701 P.2d 418, 421-22 (Okla.Crim.App. 1985); *Dutton v. State*, 674 P.2d 1134, 1138 (Okla.Crim.App. 1984); and *Parks v. State*, 651 P.2d 686, 691 (Okla.Crim.App. 1982).

Prisoners such as these would receive a new trial if prospective jurors were excluded in violation of *Grigsby*. See 758 F.2d at 229.

If *Grigsby* is upheld it is likely to be applied retroactively to all persons serving life sentences or less whose juries were selected in violation of those principles, particularly in those cases such as *Hager*, *Chaney*, and *Bloxham*, where this issue was specifically preserved. See *Pitts v. Lockhart*, 753 F.2d 689, 691 (8th Cir. 1985) (*Grigsby* rule applied retroactively in a case where the prisoner received a sentence of life without parole). Even if the issue was not preserved, there is at least a fair chance that *Grigsby* will still be applied. *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985).

In capital cases the decision to exclude prospective jurors who state that under no circumstances could they follow the law and vote to impose the death sentence in an appropriate case was made in reliance on numerous statements by this Court over the previous years. *Witherspoon v. Illinois*, 391 U.S. 510, 522, n.21 (1968); *Boulden v. Holman*, 394 U.S. 478, 483-84 (1969) (“[I]t is entirely possible that a person who has a ‘fixed opinion’ against or who does not ‘believe in’ capital punishment might nevertheless be perfectly able as a juror to abide by existing law — to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.”) (emphasis added); *Lockett v. Ohio*, 438 U.S. 586, 596-97 (1978) (“Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law

and instructions of the trial judge.”); *Adams v. Texas*, 448 U.S. 38, 45 (1980) (“The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.”); *Wainwright v. Witt*, 105 S.Ct. 844, 851 (1985) (“Exclusion of jurors opposed to capital punishment began with a recognition that certain of those jurors might frustrate the State’s legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.”).

The amici contend that these decisions by this Court have supported their belief that “[i]t is constitutionally permissible to exclude prospective jurors unable or unwilling to address impartially the penalty questions.” *Hutchins v. Woodard*, 730 F.2d 953, 960 n.11 (4th Cir. 1984).

An overwhelming number of federal courts, including four circuit courts of appeal, have accepted this view. *Keeten v. Garrison*, 742 F.2d 129, 133-35 (4th Cir. 1984); *Hutchins v. Woodard*, 730 F.2d 960 (4th Cir. 1984); *Watson v. Blackburn*, 756 F.2d 1055, 1057 (5th Cir. 1985); *Mattheson v. King*, 751 F.2d 1432, 1442 (5th Cir. 1985); *Sonnier v. Maggio*, 720 F.2d 401, 407-08 (5th Cir. 1983); *Spinkellink v. Wainwright*, 578 F.2d 582, 593-94 (5th Cir. 1978); *Rowan v. Owens*, 752 F.2d 1186, 1190-91 (7th Cir. 1984); *United States ex rel. Clark v. Fike*, 538 F.2d 750, 761-62 (7th Cir. 1976); *McCleskey v. Kemp*, 753 F.2d 877, 901 (11th Cir. 1985); *Spencer v. Zant*, 715 F.2d 1562, 1577 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, 564 (11th Cir. 1983); *Edwards v. Thigpen*, 595 F.Supp. 1271, 1284 (S.D. Miss. 1984); *Briley v. Booker*, 594 F.Supp. 1399, 1406-09 (E.D. Va. 1984); *Felder v. Estelle*, 588 F.Supp. 664, 672 (S.D. Tex. 1984); *Griffin v. Wainwright*, 588 F.Supp. 1549, 1564 (M.D. Fla. 1984); *John-*

son v. Kemp, 585 F.Supp. 1496, 1505-06 (S.D. Ga. 1984); *Prejean v. Blackburn*, 570 F.Supp. 985, 992-93 (W.D. La. 1983); *aff'd*, 743 F.2d 1091 (5th Cir. 1984); *Mitchell v. Hopper*, 538 F.Supp. 77, 93-94 (S.D. Ga. 1982); *Martin v. Blackburn*, 521 F.Supp. 685, 699-700 (E.D. La. 1981), *aff'd*, 711 F.2d 1273 (5th Cir. 1983).

Furthermore, State courts have unanimously rejected the contention that removing WEs from jury panels violates the United States Constitution, as is demonstrated by appellate decisions in twenty-nine states. *Dunkins v. State*, 437 So.2d 1349, 1354-56 (Ala. 1983); *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750, 773 (1984); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168, 169-75 (1983); *People v. Jackson*, 28 Cal.3d 264, 618 P.2d 149, 174 (1980); *Hooks v. State*, 416 A.2d 189, 194-95 (Del. 1980); *Witt v. State*, 465 So.2d 510, 512 (Fla. 1985);⁵ *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882, 889-90 (1983); *People v. Collins*, 106 Ill.2d 237, 478 N.E.2d 267, 286 (1985); *Burris v. State*, 465 N.E.2d 171, 177-180 (Ind. 1984); *White v. Commonwealth*, 671 S.W.2d 241, 245 (Ky. 1984); *State v. Prejean*, 379 So.2d 240, 242-43 (La. 1979); *Chadterson v. State*, 54 Md. App. 86, 456 A.2d 1313, 1315-16 (1983), cert. dismissed, 298 Md.App. 421, 470 A.2d 1269 (1984); *DuFour v. State*, 453 So.2d 337, 341-45 (Miss. 1984); *State v. Guinan*, 665 S.W.2d 325, 329-30 (Mo. 1984); *State v. Anderson*, 207 Neb. 51, 296 N.W.2d 440, 450 (1980); *McKenna v. State*, 705 P.2d 614, 617-18 (Nev. 1985); *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092, 1094-95 (1983); *State v. Young*, ____ N.C. ____, 325 S.E.2d 181, 191-92 (1985);

⁵ This is the case of *Wainwright v. Witt*, 105 S.Ct. 844 (1985), in which this Court ruled that a juror was properly excused for cause under *Witherspoon* principles.

State v. Jenkins, 15 Ohio St.3d 164, 179-88, 473 N.E.2d 264, 281-88 (1984); *Coleman v. State*, 668 P.2d 1126, 1137 (Okla. Crim.App. 1983); *Commonwealth v. Morales*, ____ Pa. ____, 494 A.2d 367, 374-75 (1985); *State v. Skipper*, 328 S.E.2d 58 (S.C. 1985); *State v. McKay*, 680 S.W.2d 447, 450 (Tenn. 1984); *Bass v. State*, 622 S.W.2d 101, 108-09 (Tex.Crim.App. 1981); *State v. Norton*, 675 P.2d 577, 588-89 (Utah 1983); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808, 815 (1979); *State v. Rupe*, 101 Wash.2d 664, 683 P.2d 571, 591 (1984); *State ex rel. Hopkinson v. District Court, Teton Co.*, 696 P.2d 54, 65-66 (Wyo. 1985).

Additionally, the amici submit that the court in *Grigsby* erred when it held that persons who cannot consider a punishment option in a capital case are a class cognizable under Sixth Amendment principles, which require that a jury be selected from a representative cross-section of the community.

The cases involving denial of a fair cross-section of the community have always involved situations where a class is clearly identifiable. See *Duren v. Missouri*, 439 U.S. 357 (1979) (women); *Peters v. Kiff*, 407 U.S. 493 (1972) (blacks); *Castaneda v. Partida*, 430 U.S. 482 (1977) (Mexican-Americans excluded from grand juries); and *United States v. Yazzie*, 660 F.2d 422, 426-27 (10th Cir. 1981) (Indians).

The amici contend that a group of persons who oppose the death penalty do not constitute a distinctive group in the community as was contemplated in *Duren v. Missouri*, *supra*. If this group is defined as such, there would be no limit as to what could be defined as a cognizable class. Cf. *United States v. Jones*, 728 F.2d 115, 130 (2d Cir. 1984) (ex-

clusion of non-citizens not a constitutional violation); *Cox v. Montgomery*, 718 F.2d 1036, 1038 (11th Cir. 1983) (the "young" held not to be a distinctive group for purposes of jury venue); *Davis v. Greer*, 675 F.2d 141, 146 (7th Cir. 1982) (young people between the ages of eighteen and twenty-one are not a cognizable class); *United States v. Test*, 550 F.2d 577, 591 (10th Cir. 1976) (groups of persons under forty years of age are not a cognizable class); *Flynn v. Holbrook*, 581 F.Supp. 990, 998 (D.R.I. 1984) (claim that docents constituted a cognizable class was waived); *United States v. Daly*, 573 F.Supp. 788, 792-93 (N.D. Tex. 1983) ("mobile people" and "non-whites" are not groups which had been improperly excluded from jury wheels); *Prejean v. Blackburn*, 570 F.Supp. 985, 991-92 (W.D. La. 1983), aff'd, 743 F.2d 1091 (5th Cir. 1984) (defendant waived claim that doctors and lawyers were improperly excluded); *United States v. Duran De Amesquita*, 582 F.Supp. 1326, 1328-29 (S.D. Fla. 1984) ("Hispanic" persons are not a cognizable group, as opposed to Spanish-American or Puerto Rican-Americans).

Furthermore, persons who agree on only one philosophical issue should not be treated as a cognizable class for Sixth Amendment purposes. See *United States v. Gometz*, 730 F.2d 475, 478 (7th Cir. 1984) (cross-section of community does not have to include "anti-authoritarian" personalities). More of a community of interest should be required before such a group of people are considered to be a class. *Grigsby v. Mabry*, 758 F.2d at 244-47 (Gibson, J., dissenting).

The fact that surveys and polls may demonstrate that persons who oppose the death penalty are more "defendant-

prone" does not automatically make them a cognizable group under the Sixth Amendment. If that were true, then if any group which the surveys and polls revealed to be "defendant-prone" (such as "mobile people", non-voters, or the young) was excluded from the jury panel, this would be found to be a Sixth Amendment violation. This obviously is not the intent of this Court in *Duren v. Missouri*, 439 U.S. at 364, and other cases which define a fair cross-section of the community. Those prospective jurors in the present case who were excluded because of their inability to consider a statutory penalty option have nothing in common other than being in agreement on one issue, and therefore, do not constitute a cognizable group.

Finally, in the present case there was nothing which occurred during the voir dire examination or the course of the trial which would indicate that the jury was not fair and impartial. The Respondent's contention that his jury was "prosecution-prone" in the guilt stage is based strictly on surveys of persons unconnected with the jury in the present case. He is requesting that his conviction be set aside based on "the odds" that the jury was prosecution-prone, without an actual showing of such. Traditionally, the criminal justice system has relied on the voir dire examination to make a determination regarding bias or prejudice. See *Murphy v. Florida*, 421 U.S. 794, 799-803 (1975).

CONCLUSION

The amici submit that the Eighth Circuit was in error, and that the reasoning of every other court in the United States that has addressed this issue should be followed.

For the reasons stated, the amici respectfully request that the decision of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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November, 1985

AMICUS CURIAE

BRIEF

No. 84-1865

10

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

A.L. LOCKHART,
Petitioner,

v.

ARDIA V. MCCREE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL CENTER ON
INSTITUTIONS AND ALTERNATIVES
AS AMICUS CURIAE

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498

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF THE <u>AMICUS</u>	3
STATEMENT OF THE CASE	5
ARGUMENT	5
THE CONSTITUTIONAL REQUIREMENT THAT GUILT BE DETERMINED BY A REPRESENTATIVE JURY MAY BE MET IN CAPITAL CASES WITHOUT ANY UNDUE BURDEN ON THE STATES	
CONCLUSION	17
<u>APPENDICES</u>	
APPENDIX A:	
Press Release of Governor Thomas H. Kean, dated August 6, 1982	1a
APPENDIX B:	
State's Reply to Respondent's Supplemental Brief, <u>Ex</u> <u>Parte State</u> , Filed in the Supreme Court of Alabama, Nov. 2, 1983	5a
APPENDIX C:	
Opinion of the Alabama Supreme Court, dated February 10, 1984, <u>Ex Parte State</u>	17a

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>Bean v. State</u> , 86 Nev. 80, 465 P.2d 133 (1970)	12
<u>Beaver v. State</u> , 475 S.W.2d 557 (Tenn. Cr. App. 1971)	12
<u>Beck v. Alabama</u> , 447 U.S. 625 (1980)	10
<u>Blankenship v. State</u> , 247 Ga. 590, 277 S.E.2d 505 (1981)	12
<u>Bullington v. Missouri</u> , 451 U.S. 431 (1981)	16
<u>Elledge v. State</u> , 408 So. 2d 1021 (Fla. 1981)	12
<u>Estelle v. Smith</u> , 451 U.S. 454 (1981)	15
<u>Ex Parte State</u> , _____ So. 2d _____, No. 82-650, slip op. (Ala. Feb. 10, 1984), rev'g <u>Beck v.</u> <u>Alabama</u> , _____ So. 2d _____, No. 7 Div. 909, slip op. (Ala. Crim. App. March 1, 1983) (Appendix C).	9
<u>Gardner v. Florida</u> , 430 U.S. 349 (1977)	15
<u>Grigsby v. Mabry</u> , 758 F.2d 226 (8th Cir. 1985)	6

	<u>Page</u>
<u>Hopkinson v. State</u> , 632 P.2d 79 (Wyo. 1981)	12
<u>Johnson v. State</u> , 292 Md. 505, 439 A.2d 542 (1982)	12
<u>New State Ice Co. v. Liebmann</u> , 285 U.S. 262 (1932)	6
<u>People v. Chavez</u> , 39 Cal. 3d 823, 218 Cal. Rptr. 49, 705 P.2d 372 (1985)	14
<u>People v. Hathcock</u> , 8 Cal. 3d 599, 105 Cal. Rptr. 540, 540 P.2d 476 (1963)	14
<u>Rose v. State</u> , 425 So. 2d 521 (Fla. 1982)	12
<u>Rouse v. State</u> , 222 So. 2d 145 (Miss. 1969)	11
<u>State v. Gilbert</u> , 277 S.C. 53, 283 S.E.2d 179 (1981)	12
<u>State v. Jordan</u> , 420 So. 2d 420 (La. 1982)	12
<u>State v. Lindsey</u> , 404 So. 2d 466 (La. 1981)	12
<u>State v. Moore</u> , 614 S.W. 2d 348 (Tenn. 1981)	12
<u>State v. Monturi</u> , 195 N.J. Super. 317, 478 A.2d 1266 (1984)	12
<u>State v. Silhan</u> , 302 N.C. 223, 275 S.E.2d 450 (1981)	12

	<u>Page</u>
<u>Witherspoon v. Illinois</u> , 391 U.S. 510 (1968)	10, 15

Statutes:

Fla. Stat. Ann. § 921.141	13
Ill. Ann. Stat., ch. 38, § 9-1	13
Md. Ann. Code, Art. 27, § 413	13
Miss. Code Ann. § 99-19-101	13
N.J. Stat. Ann. § 12C:11-3	9, 14
N.C. Gen. Stat. § 15A-2000	14

Legal Memoranda:

State's Reply to Respondent's Supplemental Brief, <u>Ex Parte</u> <u>State</u> , ___ So. 2d ___, No. 82-650, slip op. (Ala. Feb. 10, 1984) (Appendix B)	11
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Other Sources:

Press Release, Governor Thomas H. Kean, Aug. 6, 1982 (Appendix A) .	9
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No. 84-1865

IN THE
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ARDIA V. McCREE,

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ON WRIT OF CERTIORARI
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BRIEF FOR THE NATIONAL CENTER ON
INSTITUTIONS AND ALTERNATIVES
AS AMICUS CURIAE

The National Center on Institutions
and Alternatives respectfully submits

this amicus curiae brief in support of respondent. ^{1/}

We respond herein to the briefs filed by a number of states as amici curiae.^{2/} Those states contend that the Eighth Circuit's requirement that the states devise some method to insure that a full range of community views is represented on the jury panel at the guilt phase of a capital trial could not be implemented without harm to the efficient

^{1/} The consents of the parties are on file with the Clerk of the Court.

^{2/} Two such amici curiae briefs have been filed, one on behalf of the states of Arizona, California, Delaware, Kentucky, Louisiana, Maryland, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia and Wyoming, and the other on behalf of the states of Alabama, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Mississippi, Missouri, New Jersey, New Mexico, Oregon, South Dakota, Texas and Washington.

administration of justice. As we set forth below, however, that view is supported neither by practical considerations nor by the record of the states' own prior practices.

Interest of the Amicus

The National Center on Institutions and Alternatives ("NCIA") is a nonprofit organization which seeks to improve the administration of justice through the exploration and development of alternative means of implementing criminal sanctions. Headquartered in Alexandria, Virginia, NCIA maintains offices in Florida, Texas, California, Illinois and New York.

NCIA has devoted a large part of its resources to the study of sentencing procedures and prison conditions in a wide variety of jurisdictions. It has prepared sentencing reports in over 4,000

individual cases -- including a number of capital cases -- in approximately 65 federal jurisdictions and 45 states. Its sentencing recommendations have been adopted by the court in approximately 65% of those cases. Thus, NCIA has a substantial body of practical experience in presenting evidence relevant to criminal sentencing, in evaluating how that evidence is likely to be received, and in assessing the workability of criminal sentencing procedures.

More generally, because of its extensive studies over the years on the improvement of the administration of justice, particularly in the sentencing area, NCIA has developed a special sensitivity to the basic principle that guides this brief: procedural systems, no matter how efficient, are not ends in themselves, but only means by which fallible

humans may come as close as possible to achieving justice.

Statement of the Case

NCIA adopts the Statement of the Case of respondent McCree.

Argument

THE CONSTITUTIONAL REQUIREMENT THAT
GUILT BE DETERMINED BY A REPRESENTATIVE
JURY MAY BE MET IN CAPITAL CASES WITHOUT
ANY UNDUE BURDEN ON THE STATES

In mandating that the states adhere to the constitutional command that guilt be determined by a jury drawn from a fair cross-section of the community, the Eighth Circuit did not impose any specific procedures. On the contrary, while requiring the states to assure that all persons who could render a fair and impartial determination of guilt be permitted to serve on guilt-phase juries in capital cases, the Eighth Circuit explicitly refused to impose on the states any

particular mechanism for achieving that result. Grigsby v. Mabry, 758 F.2d 226, 229 (8th Cir. 1985). The states retain their historic role of acting as laboratories for creative experimentation, see New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J. dissenting) (1932), and are free to employ any one of a number of procedures to meet the constitutional requirement.

The available alternatives include picking additional alternate jurors and then seating them at the penalty phase, assigning sentencing to judges, or empaneling separate juries to hear each phase of the proceeding. Each of these solutions, of course, has its advantages and disadvantages. But all of them could be implemented without disruption to the existing system of administering criminal justice.

Amici's contention that the Eighth Circuit's rule "is so cumbersome and undesirable that, if it were upheld, it would induce States that wish to retain rational capital sentencing to do away with juries," Brief for Amici Alabama et. al. at 10, is simply erroneous. The Eighth Circuit's rule can be implemented by the states without abolishing the jury during the sentencing phase and without undue administrative burden.

If states that wished to retain jury sentencing had administrative burden and expense as their primary considerations, then clearly the alternative of qualifying additional alternate jurors to be seated at the penalty phase would be the preferable one. Indeed, petitioner does not even argue in his brief that such a system would impose an undue burden on the states.

If, on the other hand, such states' objections were not based upon administrative considerations, but rather upon some notion that the same jurors should hear both the guilt and penalty phases of the trial as a matter of fairness, then one would expect to see the states consistently following that practice now. But they do not. Thus, even adoption of the most intrusive alternative, that of empaneling separate juries to hear the guilt and penalty phases of the trial, would not impose any excessive burdens.

The states' concern that, under such a system, the defendant would lose the perceived benefits of having the same jury at conviction and sentencing is unfounded. A defendant would, of course, be free to waive the protections of the two-jury system and proceed with a single

jury if he believed this to be in his interest.^{3/}

Significantly, the states have not shown such solicitude for defendants in the past. Not only have they repeatedly failed to object to separate juries or to juries limited to sentencing only, they have in fact frequently argued vigorously against defendants' requests for the same jury to decide both guilt and punishment.

For example, in Ex Parte State, ____ So. 2d ____, No. 82-650, slip op. (Ala. Feb. 10, 1984) (App. B hereto), rev'g Beck v. Alabama, ____ So. 2d ____,

^{3/} In New Jersey, for example, where a separate jury is available at the sentencing phase "for good cause," N.J. Stat. Ann. § 12C:11-3, the governor who signed the bill specifically stated that a defendant could choose between a sentencing trial by the jury which convicted him, by judge, or by "a specially empaneled jury." See Press Release, Governor Thomas H. Kean, Aug. 6, 1982 (App. A hereto at 2a-3a).

No. 7 Div. 909, slip op. (Ala. Crim. App. March 1, 1983),^{4/} the intermediate appellate court had interpreted Alabama law to require a new trial on both guilt and penalty after a violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). On appeal to the Alabama Supreme Court, the Attorney General urged, as his only point of error, that the relief should have been limited to a new trial on penalty only.

The Attorney General belittled defendant's claim that a capital defendant must be tried and sentenced by the same jury: "Such a holding would run counter to common sense and notions of judicial efficiency . . . [and] would also be contrary to the overwhelming weight of authority in this country."

^{4/} The defendant was Gilbert Franklin Beck, whose previous conviction had been overturned by this Court. Beck v. Alabama, 447 U.S. 625 (1980).

See State's Reply to Respondent's Supplemental Brief (App. C hereto at 14a-15a). The Alabama Supreme Court agreed with the state and remanded defendant's case for a new sentencing hearing only, reasoning that guilt and punishment were severable issues in a capital case. (App. B at 25a-26a).

Similarly, in Rouse v. State, 222 So. 2d 145 (Miss. 1969), defendant's death sentence was reversed for Witherspoon error. The Mississippi Supreme Court, adopting the prosecutor's argument, held that a new jury could be empaneled for sentencing alone, reasoning that "guilt and punishment are severable" and that "[t]here is no reason why a hearing to fix punishment alone should present procedural difficulties." Id. at 151.

Such holdings are common. Along with Alabama and Mississippi, the appellate courts of Florida, Georgia,

Louisiana, Maryland, Nevada, North Carolina, South Carolina, Tennessee, Washington and Wyoming have all rejected arguments of the sort that the states now advance and ordered resentencing before a jury empaneled only for that purpose.^{5/}

^{5/} Rose v. State, 425 So.2d 521, 525 (Fla. 1982); Elledge v. State, 408 So.2d 1021, 1022 (Fla. 1981); Blankenship v. State, 247 Ga. 590, 594, 277 S.E.2d 505 (1981); State v. Jordan, 420 So. 2d 420, 428 (La. 1982); State v. Lindsey, 404 So. 2d 466, 488 (La. 1981); Johnson v. State, 292 Md. 405, 439 A.2d 542, 560 (1982); Bean v. State, 86 Nev. 80, 465 P.2d 133, 142 (1970); State v. Silhan, 302 N.C. 223, 275 S.E.2d 450, 477-485 (1981); State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179, 180-81 (1981); State v. Moore, 614 S.W.2d 348 (Tenn. 1981); Beaver v. State, 475 S.W.2d 557, 561 (Tenn. Cr. App. 1971); Hopkinson v. State, 632 P.2d 79, 166, 172 (Wyo. 1981); see also State v. Monturi, 195 N.J. Super. 317, 325, 478 A.2d 1266, 1270 (1984) ("concepts of due process, fundamental fairness, and judicial economy permit the court to declare before the guilt phase . . . that a non 'death-qualified' jury will be empaneled to hear the guilt phase and a separate 'death-qualified' jury will be empaneled to hear the penalty phase if required.")

Further, several states expressly provide for the empaneling of a new jury at the penalty phase under certain circumstances.^{6/} California law, West's

^{6/} Fla. Stat. Ann. § 921.141 ("If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of penalty"); Md. Ann. Code, Art. 27, § 413 (" . . . a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed . . . (1) Before the jury that determined the defendant's guilt; or (2) Before a jury impaneled for the purpose of the proceeding if: (i) The defendant was convicted upon a plea of guilty; (ii) The defendant was convicted after a trial before the court sitting without a jury; (iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or (iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; . . ."); Ill. Ann. Stat., ch. 38, § 9-1 (to the same effect); Miss. Code Ann. § 99-19-101 ("If, through impossibil-

(Continued)

Ann. Penal Code § 190.1 (1957), long contained such a provision, see, e.g., People v. Hathcock, 8 Cal. 3d 599, 105 Cal. Rptr. 540, 540 P.2d 476 (1963), and the California state courts continue to employ this practice even though the provision was dropped from the statute in

(Continued)

ity or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty"); N.J. Stat. Ann. § 12C:11-3 ("Where the defendant has been tried by jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding"); N.C. Gen. Stat. § 15A-2000 ("If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment").

1978. See, e.g., People v. Chavez, 39 Cal. 3d 823, 218 Cal. Rptr. 49, 705 P.2d 372 (1985).

Thus, many state legislatures and state courts have come to the conclusion that in at least some instances having a jury hear evidence concerning penalty only is preferable to having a single jury hear both guilt and punishment issues.^{7/} The states have not thought that this procedure results in some

^{7/} This Court has deferred to such state choices. In Smith v. Oklahoma, 464 U.S. 924 (1983), Estelle v. Smith, 451 U.S. 454 (1981), Gardner v. Florida, 430 U.S. 349 (1977), and Witherspoon v. Illinois, 391 U.S. 510 (1968), it refused to overturn the murder convictions of defendants in cases in which it found error that infected the sentencing phase of the proceeding. In each case, the Court remanded the case for new proceedings consistent with its opinion.

fundamental unfairness to defendants. Nor have they found any great practical difficulty in following it. The states put forward no reasons why their own sensible prior determinations should now somehow be altered by the fact that the Eighth Circuit's ruling allows defendants to benefit from the procedure as well.

In fact, precedent in this Court supports precisely the opposite view. In Bullington v. Missouri, 451 U.S. 431, 438 (1981), the Court held that in a bifurcated trial where there are separate hearings on guilt and penalty each phase is essentially a trial on each issue. Thus an "acquittal" on the penalty phase has double jeopardy effect. The clear purport of this ruling is that a system of dual proceedings on guilt and punishment is not only perfectly appropriate, but may be constitutionally required in some cases.

This is such a case. As fully demonstrated by the majority opinion below and respondent's thorough brief, the constitutional requirement that guilt be determined by a jury chosen from a fair cross-section of the community affirmatively mandates the adoption of some sort of mechanism to reconcile the interest of a capital defendant in a fair trial at the guilt phase with the interest of the state in a fair trial at the penalty phase.

Conclusion

The decision of the Court of Appeals should be affirmed.

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Dated: December 23, 1985

APPENDICES

APPENDIX A

Press Release of Governor Thomas H. Kean,
dated August 6, 1982

FROM THE OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE: CONTACT:
 PAUL WOLCOTT
 DAVID DE MAIO

Friday, August 6, 1982

The following are the major provisions of S-112, signed today by Governor Thomas H. Kean:

- The bill institutes a new murder statute in the New Jersey Code of Criminal Justice which includes a two-tiered procedure for imposing the death penalty upon a defendant charged under the new statute.

- A first trial to convict, either by jury or judge at the request of the defendant, will be followed by a trial to sentence. Should a defendant plead guilty, he may either be tried for sentence by the convicting judge or a specially empaneled jury. Should he plead not guilty and be convicted by a

judge, he would have the option of a sentencing trial by the same judge or a special jury. If convicted by jury, he could choose between a trial to sentence by the same judge and jury, a judge alone, or a specially empaneled jury. Existing statutes providing for the dismissal of judges and jury members would also apply.

- During the trial to sentence, the prosecution must prove that aggravating circumstances, as defined under the bill, exist. The defense may enter evidence of mitigating factors. If no aggravating circumstances exist, or if mitigating circumstances outweigh aggravating circumstances in the opinion of the judge or jury, the death penalty may not be imposed.

- Should the death sentence not be imposed, the convict will be subject to

Appendix A

a 30-year minimum prison term without parole. Provisions exist for extended sentences.

- In the event the death penalty is imposed, an automatic review to determine "proportionality" will be conducted by the State Supreme Court. The review is intended to ensure fairness and equity under the new statute. Execution of sentence would only follow the Court's review.

- As with other criminal statutes, the defendant/convict would retain his or her rights of appeal or application for clemency or commutation of sentence.

APPENDIX B

State's Reply to Respondent's
Supplemental Brief, Ex Parte
State, Filed in the Supreme
Court of Alabama, Nov. 2, 1983 *

* The pagination in brackets is that of the State's Brief.

IN THE SUPREME COURT OF ALABAMA

NO. 82-650

EX PARTE: STATE OF ALABAMA

IN RE: GILBERT FRANKLIN BECK,

Appellant-Respondent

vs.

STATE OF ALABAMA,

Appellee-Petitioner

On Writ of Certiorari to the
Court of Criminal Appeals

An Appeal from the Circuit Court of
Etowah County, Alabama

STATE'S REPLY TO RESPONDENT'S
SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
<u>TABLE OF AUTHORITIES</u>	ii
<u>REPLY TO RESPONDENT'S SUPPLEMENTAL ARGUMENT</u>	1
<u>CERTIFICATE OF SERVICE</u>	7

TABLE OF AUTHORITIES

<u>CASE</u>	<u>PAGE(S)</u>
<u>Berard v. State</u> , 402 So. 2d 1044 (Ala. 1981)	
<u>Patterson v. Commonwealth</u> , 283 So. 2d 212 (Va. 1981)	
<u>State v. McDaniel</u> , 617 P.2d 1129 (Ariz. 1980)	
<u>Thomas Warren Whisenhant v.</u> <u>State</u> , No. 1 Div. 333 (Ala. Cr. App. Nov. 23, 1983)	

REPLY TO RESPONDENT'S
SUPPLEMENTAL ARGUMENT

In his supplemental brief, Appellant argues that the cases of Patterson v. Commonwealth, 283 So. 2d 212 (Va. 1981), and State v. McDaniel, 617 P.2d 1129 (Ariz. 1980), are persuasive because they involved "the identical situation now faced by this Court." Not so. Those two cases from other jurisdictions are clearly inapposite.

As respondent concedes, in Patterson there was a Virginia statute which specifically required that the punishment in a capital case be set by the same jury which convicted the defendant and none other. Likewise, in the McDaniel case an Arizona statute precluded any judge from sentencing a capital defendant unless that judge had presided at the guilt stage. There is no such requirement in Alabama, either in statute or case law.

In fact, the relevant case law indicates exactly the contrary.

In Berard v. State, 402 So. 2d 1044 (Ala. 1981), which involved the same statute, the Court of Criminal Appeals affirmed the conviction but remanded for a new sentence hearing because of errors which affected the sentence alone. After noting that the trial judge who presided at the guilt stage and who originally sentenced the defendant was no longer on the bench, the Court of Criminal Appeals held:

As the trial judge who conducted the hearing is no longer holding that office, the hearing must necessarily be conducted by another circuit judge. Such a procedure will necessitate the trial

[2]

judge reviewing the entire evidence presented at the trial before holding the hearing or making his findings. . . .

402 S.2d at 1051. That case law is squarely contrary to the law in Arizona which was announced in the McDaniel case on which Appellant relies.

Likewise, the Court of Criminal Appeals decision in Thomas Warren Whisenant v. State, No. 1 Div. 333 (Ala. Cr. App. Nov. 23, 1983), is contrary to Respondent's position. In the Whisenant case the Court of Criminal Appeals affirmed the conviction but reversed the sentence and remanded for a new sentence hearing because of improper prosecutorial remarks during the punishment phase. The Court specifically addressed the issue of whether a new jury which had not convicted the defendant could re-sentence him on remand. It held:

Appellant's conviction and sentence having been the product of a bifurcated trial, involving two separate hearings, we do not deem it necessary to reverse appellant's conviction. Appellant received a

fair trial as to his guilt of the substantive crime and the conviction itself should be affirmed. However, due to the statements discussed above, this cause must be remanded with directions that a new sentencing hearing be held. Because the original jury has been prejudiced, the hearing must necessarily be conducted before another jury, which shall review the entire evidence presented at trial before rendering its verdict. Berard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981).

The capital felony law under which this case was tried, interpreted by Beck

[3]

to require a bifurcated trial, does not state that the same jury which convicts a defendant must sentence him as well. While no provision was made for an appropriate decree on appeal if error was found only in the sentencing phase and not the guilt phase, we view this course as appropriate. Miller v. State, 237 Ga. 557, 229 S.E.2d 379 (1976); Rouse v. State, 222 So. 2d 145 (Miss. 1969); but see State v. English, 367 So. 2d 815 (La. 1979); Ellison v. State, 432 S.W.2d 955 (Texas 1968).

. . . .

The guilt phase of the trial will stand. A new jury will be empaneled to review anew the evi-

dence at the penalty phase, including all relevant aggravating and mitigating circumstances. We believe this course of action to be in keeping with the bifurcated proceeding established in Beck. The guilt phase is affirmed.

Thomas Warren Whisenant v. State, No. 1 Div. 333 (Ala. Cr. App. Nov. 23, 1983), Ms. op. at 26-27 (emphasis in original). That holding, entered in a case tried under the same post-Beck guidelines as this one, has never been questioned.*

[4]

* On certiorari in that case this Court did hold that the Court of Criminal Appeals should have considered the harmless error rule, Thomas Warren Whisenant v. State, No. 82-333 (Ala. July 8, 1983), and after doing so on remand that court affirmed the sentence as well as the conviction, Thomas Warren Whisenant v. State, No. 1 Div. 333 (Ala. Cr. App. Aug. 30, 1983) (on remand), thereby obviating the need for a new sentence hearing. However, neither this Court's opinion nor the opinion of the Court of Criminal Appeals on remand questioned in any way that court's holding on initial consider-

(Continued)

Because the Whisenant case involves Alabama law, it and not the Virginia Supreme Court's decision in Patterson v. Commonwealth, supra, is persuasive.

Finally, this Court should also note that Appellant's contention extends far beyond this case. If his position is accepted, every time there is any error affecting the sentence alone in a capital case, the entire guilt stage will have to be retried as well. That will be true no matter how fairly and properly the defendant's guilt has been determined, because the rule for which Appellant contends is that a capital defendant can never be sentenced by a jury that did not sit at his guilt stage. Such a holding would run counter to common sense and notions of judicial efficiency, and it

(Continued)

ation that if an error affecting only the sentence occurred it could be remedied by another sentence hearing before a new jury.

would needlessly interject an element of arbitrariness into capital litigation in this state. It would also be contrary to the overwhelming weight of authority in this country. The appellate courts of Georgia, Florida, Louisiana, North Carolina, South Carolina, Maryland, Nevada, Tennessee, Washington, and Mississippi have all held that resentencing hearings can be conducted before a jury different than the one which convicted the defendant at his

[5]

initial trial. See pp. 3-4 of the State's certiorari reply brief in this case.

Respectfully submitted,

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Appendix B

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APPENDIX C

Opinion of the Alabama
Supreme Court, dated
February 10, 1984,*
Ex Parte State

* The pagination in brackets is that
of the Court's slip opinion.

THE STATE OF ALABAMA -
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

Ex parte: State of Alabama

Petition for Writ of Certiorari
to the Court of Criminal Appeals

(Re: Gilbert Franklin Beck, Alias

82-650

v.

State of Alabama)

ADAMS, JUSTICE.

On retrial, respondent Beck was convicted of the capital offense of robbery-intentional killing, Code 1975, § 13-11-2(a)(2). Thereafter, he was sentenced to death.

The Court of Criminal Appeals remanded this case to the trial court for additional inquiry under Witherspoon v.

[2]

Illinois, 391 U.S. 510 (1968). After return of the case from remand, the Court of Criminal Appeals entered a decision reversing both the conviction and the sentence of death, because a juror had been improperly excused for cause as a result of her opposition to the death penalty. This court then granted the State's petition for a writ of certiorari.

The State neither disputes the finding of the Court of Criminal Appeals that there was error under Witherspoon, nor contests the fact that another sentence proceeding is required. The sole issue raised by the State is whether jury exclusion error under Witherspoon v. Illinois, supra, necessitates a new guilt stage trial when, under our bifurcated procedure, a separate sentence proceeding is required. We hold that only a new

sentence proceeding is required on remand to the trial court.

Resolution of the above issue involves the proper interpretation to be placed on the verdict form requirement of Code 1975, § 13-11-2(a), which provides:

If the jury finds the defendant guilty, it shall fix the punishment at death

Having rejected the argument that we could judicially sever this jury participation provision, we have construed it to be

. . . permissive and to mean that the jury cannot fix punishment at death until it takes into account the circumstances of the offense together with the character and propensity of the offender, under sentencing procedures which will minimize the risk of an arbitrary and capricious imposition of the death penalty.

Beck v. State, 396 So. 2d 645, 660 (Ala. 1980) (emphasis in original).

Respondent Beck asserts that we should further interpret § 13-11-2(a),

Code 1975, to mean that the same jury is responsible for the determination of guilt and the fixing of punishment, precluding remand for a new sentence hearing only before a newly impaneled jury. He argues that this is the plain meaning of the language of the statute, requiring the State to undertake both a [3]

new trial on the issue of guilt and a new punishment proceeding if it wishes to obtain a death sentence for respondent Beck.

We are aware of no decisions of the Supreme Court of the United States or the lower federal courts that support respondent's proposed interpretation of § 13-11-2(a), Code 1975. In Witherspoon v. Illinois, the Supreme Court of the United States made it clear that its holding regarding jury exclusion error

did not render invalid the petitioner's conviction, but only his sentence of death. 391 U.S. at 522 n.21. Likewise, the United States Court of Appeals for the Eleventh Circuit in a recent case involving Witherspoon error, held invalid only the sentence of death; moreover, the court remanded the case with directions that the State choose either "(1) to conduct a new sentence proceeding, in the manner provided by state statute, or (2) to vacate petitioner's sentence and impose a sentence less than death in accordance with state law." Hance v. Zant, 696 F.2d 940, 957 (11th Cir. 1983). Accord, Granviel v. Estelle, 655 F.2d 673, 684 (5th Cir. 1981). Having carefully studied these authorities and others, we think respondent Beck's conviction (as opposed to his sentence)

was improperly reversed for Witherspoon error by the Court of Criminal Appeals.

Prior to its decision in this case, our Court of Criminal Appeals had held that error occurring during the sentencing phase alone of a bifurcated capital trial did not necessitate reversal of the conviction, but only a remand with directions that a new sentence hearing be held. Whisenant v. State, [1 Div. 333, Ms. Nov. 23, 1982], ___ So. 2d ___ (Ala. Crim. App. 1982), aff'd in part and remanded with directions, [82-332, 82-333, Ms. July 8, 1983] ___ So. 2d ___ (Ala. 1983), aff'd on remand, [1 Div. 333, Ms. Aug. 30, 1983] ___ So. 2d ___ (Ala. Crim. App. 1983), cert. granted December 30, 1983. The court opined that the Alabama death penalty statute under which both

[4]

petitioners Beck and Whisenhant were tried, as interpreted by this court in Beck v. State, supra, "does not require that the same jury which convicts a defendant must sentence him as well." Whisenhant v. State, supra, November 23, 1982 (emphasis added). The court held that a hearing on remand "must necessarily be conducted before another jury, which shall review the entire evidence presented at trial before rendering its verdict." Id., citing Bernard v. State, 402 So. 2d 1044 (Ala. Crim. App. 1981). We agree.

In support of its decision to remand for a new sentence hearing in Whisenhant, the Court of Criminal Appeals relied on the construction given the Mississippi death penalty statute by that state's supreme court in Rouse v. State, 220 So. 2d 145 (Miss. 1969). In Rouse, the

court, interpreting a capital punishment statute similar to Alabama's, held that "the words 'the jury rendering the verdict' . . . were not intended to require the same jury to fix the punishment where the accused pleads guilty or he successfully raises the Witherspoon rule." Id. at 151. Accord, Bean v. State, 465 P.2d 133, 142 (Nev. 1970). We think § 13-11-2(a), Code 1975, requires no more when Witherspoon error is found.

The Supreme Court of Mississippi premised its ruling in Rouse on a severability of the issues of guilt and punishment in a capital punishment case; it found such a concept to be "implicit" in the United States Supreme Court's holding in Witherspoon. Rouse v. State, 222 So. 2d at 150. We think this understanding readily comports with the bifurcated trials that we have ordered

under Alabama's death penalty act. Beck v. State, 396 So. 2d at 662. Such trials include both a guilt-finding phase and, if the defendant is found guilty, a sentence-determining phase. We are of the opinion that under this scheme remand for a new sentence hearing is an appropriate decree on appeal if error is found in the [5]

sentencing phase but not in the guilt-finding phase.* Whisenhant v. State, supra, Nov. 23, 1982.

REVERSED AND REMANDED.

Torbert, C.J., Maddox, Faulkner, Jones, Almon, Shores, Embry and Beatty, JJ., concur.

* The procedure outlined in this opinion is identical to that provided for in Alabama's current death penalty act. Section 13A-5-46(b), Code 1975 (Supp. 1981), provides:

(Continued)

(Continued)

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impaneled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

AMICUS CURIAE

BRIEF

BEST AVAILABLE COPY

No. 84-1865

Supreme Court, U.S.

FILED

DEC 23 1985

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION,
Petitioner,

v.

ARDIA V. MCCREE,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICUS CURIAE*
AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONER

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December 23, 1985

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT..	2
ARGUMENT	4
I. THE SOCIAL SCIENCE DATA TENDERED BY RESPONDENT DEMONSTRATE THAT DEATH-QUALIFIED JURIES ARE MORE PRO-PROSECUTION AND UNREPRESENT- ATIVE THAN TYPICAL CRIMINAL JURIES AND THAT DEATH QUALIFICATION IM- PAIRS JURY FUNCTIONING	4
A. The Social Science Research has Focused on the Relevant Categories of Prospective Jur- ors, Including that Subset of Jurors Exclud- able Under <i>Witherspoon</i>	4
B. Social Science Research Conducted Over the Course of Three Decades Directly Addresses the Constitutional Issues at Stake	5
1. The data show that death-qualified juries are conviction prone	6
2. The data show barring of “Witherspoon Excludables” creates unrepresentative juries, thereby implicating defendant’s right to a jury composed from a fair cross-section of the community	16
a. Death qualification excludes a signifi- cantly large subset of the population....	16
b. Those excluded through death qualifi- cation share common attitudes on issues related to criminal justice	17
c. Death qualification results in under- representation on juries of blacks and women	19

TABLE OF CONTENTS—Continued

	Page
3. The data suggest that death qualification interferes with the proper functioning of the jury	20
II. CONTRARY TO THE STATES' CRITICISMS, WHICH ARE EITHER ERRONEOUS OR UNRELATED TO THE PERTINENT RESEARCH, THE SOCIAL SCIENCE DATA TENDERED BY RESPONDENT SATISFY APPLICABLE CRITERIA FOR EVALUATING THE SOUNDNESS OF SCIENTIFIC RESEARCH	21
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
<i>Adams v. Texas</i> , 448 U.S. 38 (1980)	2, 5, 28, 29
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	21
<i>Alexander v. Louisiana</i> , 404 U.S. 625 (1972)	23
<i>Apodaca v. Oregon</i> , 406 U.S. 404 (1972)	20, 23
<i>Ballew v. Georgia</i> , 435 U.S. 223 (1978)	6, 9, 20, 23
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	29
<i>Carter v. Jury Commission</i> , 396 U.S. 320 (1970)	23
<i>Castenada v. Partida</i> , 430 U.S. 482 (1977)	22, 23
<i>Colgrove v. Battin</i> , 413 U.S. 149 (1973)	23
<i>Duren v. Missouri</i> , 439 U.S. 357 (1979)	6
<i>Grigsby v. Mabry</i> , 569 F. Supp. 1273 (E.D. Ark. 1983), <i>aff'd</i> , 758 F.2d 226 (8th Cir. 1985)	4, 16, 17
<i>Hazelwood Sch. Dist. v. United States</i> , 433 U.S. 299 (1977)	22
<i>Hovey v. Superior Court</i> , 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980)	4, 15, 19
<i>In re Winship</i> , 397 U.S. 358 (1970)	21
<i>Johnson v. Louisiana</i> , 406 U.S. 356 (1972)	20, 23
<i>Peters v. Kiff</i> , 407 U.S. 493 (1972)	20
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975)	6, 20
<i>Wainwright v. Witt</i> , 105 S. Ct. 844 (1985)	2, 5, 14, 29
<i>Williams v. Florida</i> , 399 U.S. 78 (1970)	23
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968)	<i>passim</i>
UNITED STATES CONSTITUTION:	
Amendment VI	5, 16
Amendment XIV	5
MISCELLANEOUS:	
Abelson, <i>Three Models of Attitude-Behavior Consistency in 2 VARIABILITY AND CONSISTENCY OF SOCIAL BEHAVIOR: THE ONTARIO SYMPOSIUM</i> 131 (M. Zanna, C. Herman, E. Higgins eds. 1982)	24
ARKANSAS ARCHIVAL STUDY (1981)	16, 17, 27
D. BARNES, <i>STATISTICS AS PROOF: FUNDAMENTALS OF QUANTITATIVE EVIDENCE</i> (1983)	23
Berry, <i>Death-Qualification and the "Fireside Induction,"</i> 5 U. ARK. LITTLE ROCK L. J. 1 (1982) ..	4, 10, 25

TABLE OF AUTHORITIES—Continued

	Page
Bronson, <i>Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California</i> , 3 WOODROW WILSON L.J. 11 (1980)	16, 17
Bronson, <i>On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen</i> , 42 U. COLO. L. REV. 1 (1970)	16, 17
J. CARLSMITH, P. ELLSWORTH & E. ARONSON, <i>METHODS OF RESEARCH IN SOCIAL PSYCHOLOGY</i> (1976)	8
Cowan, Thompson & Ellsworth, <i>The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation</i> , 8 L. HUM. BEHAV. 53 (1984)	9, 10, 11, 12, 18, 20, 28
W. DANIELS, <i>BIostatISTICS: A FOUNDATION FOR ANALYSIS IN THE HEALTH SCIENCES</i> (1983)	23
A. DELAUNOIS (ed.), <i>BIostatISTICS IN PHARMACOLOGY</i> (1979)	23
B. EASTMAN, <i>INTERPRETING MATHEMATICAL ECONOMICS AND ECONOMETRICS</i> (1985)	23
Fitzgerald & Ellsworth, <i>Due Process vs. Crime Control: Death Qualification and Jury Attitudes</i> , 8 L. & HUM. BEHAV. 31 (1984)	16, 17, 18, 19, 20, 28
Gillers, <i>Deciding Who Dies</i> , 129 U. PA. L. REV. 1 (1980)	5
Goldberg, <i>Attitude Toward Capital Punishment And Behavior As A Juror In Simulated Cases</i> (Morehouse College, undated)	6, 7, 8
Goldberg, <i>Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law</i> , 5 HARV. C.R.-C.L. L. REV. 53 (1970)	6, 7, 8
I. GUTTMAN, <i>INTRODUCTORY ENGINEERING STATISTICS</i> (3d ed. 1983)	23
Haney, <i>Examining Death Qualification</i> , 8 L. & HUM. BEHAV. 133 (1984)	15, 26
Haney, <i>On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process</i> , 8 L. & HUM. BEHAV. 121 (1984)	14, 26

TABLE OF AUTHORITIES—Continued

	Page
Haney, <i>Juries and the Death Penalty: Readdressing the Witherspoon Question</i> , 26 CRIME & DELINQ. 512 (1980)	15, 26
R. HASTIE, S. PENROD & N. PENNINGTON, <i>INSIDE THE JURY</i> (1983)	12, 13, 20
G. JACKSON, <i>DECISIONS UNDER CERTAINTY: DRILLING DECISIONS BY GAS AND OIL OPERATORS</i> (1979)	23
P. JEDAMUS, <i>STATISTICAL ANALYSIS FOR BUSINESS DECISIONS</i> (1976)	23
Jurow, <i>New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process</i> , 84 HARV. L. REV. 567 (1971)	9, 10, 16, 27
Kadane, <i>After Hovey: A Note Taking into Account Automatic Death Penalty Jurors</i> , 8 L. & HUM. BEHAV. 115 (1984)	28
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TABLE OF AUTHORITIES—Continued

	Page
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Osser & Bernstein, <i>The Death-Oriented Jury Shall Live</i> , 1 U. SAN FERN. V. L. REV. 253 (1968)	15
PRECISION RESEARCH STUDY (1981)	17, 19
M. SAKS, JURY VERDICTS (1977)	13
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White, <i>The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries</i> , 58 CORNELL L. REV. 1176 (1973)	11
Wilson, <i>Belief In Capital Punishment And Jury Performance</i> (Univ. of Chicago 1967)	6, 7, 8
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H. ZEISEL, <i>SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT</i> (1968)	6, 7, 8, 24, 25, 27

**BRIEF FOR AMICUS CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONER**

INTEREST OF AMICUS CURIAE

The American Psychological Association (APA), a non-profit, scientific, and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Its purpose, as reflected in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare."

A central issue in this case is the applicability and methodological rigor of the social science evidence introduced and considered in the courts below. Experimental social psychologists have generated almost all the significant research pertinent to these issues and provided most of the expert testimony introduced in this and similar cases. A substantial number of APA's members are concerned with these issues, and more broadly, with the usefulness of experimental psychology to the legal system.

The APA contributes *amicus* briefs only where it has special knowledge to share with the Court; it has felt it particularly important to do so where scientific issues have been in the forefront. *E.g.*, *Mills v. Rogers*, 457 U.S. 291 (1982) (risks and benefits of psychotropic medication); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (measurability of psychological harm in potential disasters). The APA regards this as one of those cases, and as an opportunity to offer this Court an objective analysis of the social science evidence germane to a thoughtful resolution of the serious constitutional questions confronting it.

Petitioner and respondent have consented to the filing of this *amicus* brief. Their letters of consent are on file with the Clerk of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Among the 270 exhibits introduced in the *habeas corpus* proceedings below were a wide variety of studies generated primarily by social psychologists specializing in research designed to address legal questions. The court heard from several social science experts as well. These researchers and experts have addressed the empirical question whether a "death-qualified" jury (one formed under standards developed in *Witherspoon v. Illinois*, 391 U.S. 510 (1968)),¹ is more likely to convict a capital criminal defendant than a jury that—like juries formed in all *non-capital* criminal cases—also includes members of the venire who because of absolute scruples against imposing the death penalty are excluded from death-qualified juries.

In *Witherspoon*, this Court declined to rule that death-qualified juries are "less than neutral with respect to guilt," *id.* at 520 n.18, and therefore unconstitutional, because the research and data then extant was, in its view, too "tentative and fragmentary." *Id.* at 517. The Court expressly left open the possibility it would rule differently if further research more clearly demonstrated death-qualified juries' non-neutrality. Since that time, researchers, particularly psychologists, have conducted new research designed to answer definitively the question whether death-qualified juries are "conviction prone."

In ruling that excluding jurors who have absolute scruples against imposing the death penalty at the guilt/innocence (culpability) phase² violates the Constitution,

¹ With respect to the impact of *Adams v. Texas*, 448 U.S. 38 (1980), and *Wainwright v. Witt*, 105 S. Ct. 844 (1985), on the social science research findings relevant to this case, see *infra*, pp. 29-30.

² Not at issue in this case is the State's authority to exclude such jurors during the *sentencing* phase. Also not at issue is the State's

the courts below relied heavily on this research. In urging affirmance of the Eighth Circuit's decision, respondent does as well. The States³ attack the research on several grounds, and at petitioner's urging the integrity of the data is one of the major questions this Court has agreed to answer. See Petition for Writ of Certiorari at 20; 54 U.S.L.W. 3223 (U.S. October 8, 1985).

To aid this Court in resolving this conflict, the APA will abstract and critique the methodology and major empirical findings in the relevant research. *Amicus* concludes that the extant research addresses the Sixth and Fourteenth Amendment issues that are at the heart of this controversy. As *amicus* demonstrates, without credible exception, the research studies show that death-qualified juries are prosecution prone, unrepresentative of the community, and that death qualification impairs proper jury functioning. Point I.

Amicus next evaluates the data in light of the States' eight major criticisms of this research. APA concludes that the States' objections are either mistaken or unrelated to the relevant research. Further, *amicus* concludes that the research clearly satisfies the criteria for evaluating the methodological soundness, reliability, and utility of empirical research. Point II.

In sum, the research now addresses and answers the empirical question left open in *Witherspoon*. Insofar as those data help resolve the constitutional questions at issue here, they support the position of the respondent and the decision below.

authority to exclude jurors during both the culpability and sentencing phases whose "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Witherspoon v. Illinois*, 391 U.S. at 522-523 n.21.

³ By "States," APA refers to Petitioner Lockhart, as well as 16 States that submitted a Brief *Amici Curiae* in support of petitioner.

ARGUMENT

I. THE SOCIAL SCIENCE DATA TENDERED BY RESPONDENT DEMONSTRATE THAT DEATH-QUALIFIED JURIES ARE MORE PRO-PROSECUTION AND UNREPRESENTATIVE THAN TYPICAL CRIMINAL JURIES AND THAT DEATH QUALIFICATION IMPAIRS JURY FUNCTIONING.

A. The Social Science Research has Focused on the Relevant Categories of Prospective Jurors, Including that Subset of Jurors Excludable Under *Witherspoon*.

Understanding the relevant research first requires familiarity with the categories of the venire generally used by researchers and judges addressing the issues before this Court. The members of the venire competent to act as jurors can be aligned along a spectrum of attitudes concerning the imposition of the death penalty. This continuum may be usefully divided into the following classifications:⁴

Automatic Death Penalty Group (ADP)—These jurors will always vote for the death penalty in a capital case.

Favor Death Penalty Group (FDP)—These jurors favor the death penalty but will not vote to impose it in every capital case.

Indifferent Group—These jurors neither favor nor oppose the death penalty.

Oppose Death Penalty Group (ODP)—These jurors either oppose the death penalty or have doubts about it but nevertheless will sometimes vote to impose it.

⁴ This classification is adapted from *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 1311, 168 Cal. Rptr. 128 (1980). It was adopted in substantially similar form by the district court below. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1288 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985). See Berry, *Death Qualification and the "Fireside Induction,"* 5 U. ARK. LITTLE ROCK L. J. 1, 2 (1982) [hereinafter Berry].

Automatic Life Imprisonment Group (ALI)—These jurors will always vote for life imprisonment rather than impose the death penalty. They may be challenged for cause at the sentencing phase under the standards set forth in *Witherspoon* and are characteristically known as "Witherspoon Excludables" (WEs).

WEs are further subdivided into two subsets, distinguished on the basis of an evaluation of their impartiality at the culpability phase. One subset is not impartial; its members state that they cannot be fair and impartial in deciding guilt, knowing that a guilty verdict might ultimately result in imposition of the death penalty. These members of the venire are characteristically described as "Nullifiers." See *Wainwright v. Witt*, 105 S. Ct. at 852; *Adams v. Texas*, 448 U.S. at 48; *Witherspoon v. Illinois*, 391 U.S. at 522-523.

The second WE subset consists of those who, although they would never vote to impose the death penalty, state they can be impartial on the issue of the defendant's guilt or innocence. These members of the venire are characteristically denominated as "Guilt Phase Includables" (GPIs). But because almost all American jurisdictions use the same jury to decide both culpability and sentence in capital cases, see Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 101-129 (1980), GPIs are excluded prior to the culpability phase along with Nullifiers.

B. Social Science Research Conducted Over the Course of Three Decades Directly Addresses the Constitutional Issues at Stake.

The empirical question whether death-qualified juries systematically favor the prosecution at the culpability phase bears upon three distinct but related constitutional doctrines under the Sixth and Fourteenth Amendments.⁵ First, the process of death qualification may produce juries that are less than neutral with respect to guilt and uncommonly prone to convict. *E.g.*, *Witherspoon v.*

⁵ APA will leave to the parties an extended discussion of the case law that develops these doctrines.

Illinois, 391 U.S. 510 (1968). This relates to the outcome and verdict of the jury. Second, the systematic exclusion from the jury of a group of eligible citizens possessing distinctive and relevant attitudes and perspectives diminishes the representativeness of capital juries, and may implicate the fair cross-section requirement. *E.g.*, *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975). This relates to the selection and demographic and attitudinal composition of the jury. Third, the exclusion of these distinct perspectives may impair proper functioning of the jury by reducing diversity of jurors, lessening the accuracy of jury decisionmaking, and diminishing the potential for the counterbalancing of community viewpoints. *E.g.*, *Ballew v. Georgia*, 435 U.S. 223 (1978). This relates to jury deliberation and adjudication.

1. **The data show that death-qualified juries are conviction prone.**

The question whether a jury qualified to carry out capital sentencing is more apt to convict than juries in other criminal cases was first systematically analyzed and answered in the affirmative in a seminal article by Oberer in 1961.⁶ The article prompted Witherspoon's use of three then-unpublished studies in his 1968 challenge to his death sentence. These *Witherspoon* studies, subsequently discussed in this Court's decision in his case, were authored by Wilson, Goldberg, and Zeisel⁷ and are abstracted in Table 1.

⁶ Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 TEXAS L. REV. 545 (1961) [hereinafter Oberer].

⁷ Wilson, *Belief in Capital Punishment and Jury Performance* (Univ. of Chicago 1967) (unpublished manuscript); Goldberg, *Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Cases* (Morehouse College, undated) (unpublished manuscript); subsequently published as Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970); Zeisel, *Some Insights into the Opera-*

Table 1. Studies of Conviction-Proneness Before the Court in *Witherspoon*

Author	Jurors	Stimulus Materials	Death Qualifying Question	Results	Sig. Level *
Wilson ^b	248 college students	Written descriptions	ODP & WE	Jurors favoring DP more likely to convict	p. < .02
Goldberg ^c	200 college students	Written descriptions	ODP & WE	As above	p. < .06
Zeisel ^d	264 actual jurors	Actual felony trials	Scruples against DP	As above	p. < .04

* This category measures statistical significance. "p" value of .01 is highly significant; .05 is significant; .10 is marginally significant. For full discussion of statistical significance see *infra*, pp. 22-23.

^b Jurors were asked to agree/disagree with 15 statements measuring bias toward prosecution and were given 5 descriptions of murder cases involving 6 defendants. 17% scrupled jurors (conscientious scruples against death penalty) voted for guilt in 5-6 cases compared to 30% of nonscrupled jurors. Jurors favoring death penalty also more likely to assign severe punishments, more likely to agree with pro-prosecution statements, and more likely to reject insanity defense.

^c 100 whites and 100 blacks (116 male; 84 female), read synopses of 16 capital cases. Nonscrupled jurors voted to convict more often than scrupled jurors (75% vs. 69%) and imposed more severe sentences. Blacks more likely to oppose imposition of death penalty (76%) than whites (47%).

^d On their last day of jury service, jurors asked to disclose their jury's first ballot vote and their own first ballot vote, yielding 464 split first ballot votes. Weight of evidence controlled by dividing data into 11 different "constellations" of guilty/not guilty splits on first ballots. A "constellation" was defined by how many jurors voted "guilty" on a particular ballot. Nonscrupled jurors reached point of "equal likelihood" of voting either guilty or not guilty when strength of evidence yielded 4 first ballot guilty votes. Scrupled jurors did not exceed "equal likelihood" point until there were 8 first ballot guilty votes. In 10 of 11 first ballot constellations, nonscrupled jurors voted guilty more often than scrupled jurors.

These early studies supported the hypothesis that death-qualified juries favor the prosecution. But, to a greater or lesser extent, they possessed at least one of four methodological problems that made them, *standing alone*, less than definitive in guiding this Court's resolution of the constitutional issues before it. First, the short written descriptions that Wilson and Goldberg used as stimulus materials were not sufficiently realistic to permit confident generalization to the real world.⁸ Second, the participants in the Wilson and Goldberg studies were college students. Although many of them may have been eligible to be jurors, the extent to which students are representative of real jurors is not clear. Third, the student jurors voted for guilt/innocence without group deliberation. Fourth, all three studies identified participants by the legally appropriate standards used at the time. Because *Witherspoon* had not yet articulated the proper standard, the researchers asked whether a jury formed by excluding all jurors having scruples against the death penalty was more likely to convict than a jury comprised of those not having such scruples. The difference in conviction behavior between those groups of jurors does not directly address the *Witherspoon* issue because the scrupled group includes those opposed to the death penalty (ODPs) and both subsets of WEs (Nullifiers and GPIs), rather than consisting solely of GPIs.

Zeisel's study was open only to the last criticism. Furthermore, because it used actual jurors in actual trials, Zeisel demonstrated that the differences in conviction rates shown in other studies extend to actual situations, a demonstration that heightens the reliability of results gleaned from simulations. And despite these criticisms,

tion of Criminal Juries (Univ. of Chicago 1957) (unpublished manuscript); subsequently published as H. ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT (Center for Studies of Criminal Justice, Univ. of Chicago Law School, 1968) [hereinafter Zeisel].

⁸ See J. CARLSMITH, P. ELLSWORTH & E. ARONSON, METHODS OF RESEARCH IN SOCIAL PSYCHOLOGY (1976).

this early research taken together provided the foundation for later, more sophisticated studies.

The *Witherspoon* Court's reluctance to rely on these studies was supported by more than these methodological problems. Throughout the appeals process, *Witherspoon*'s counsel had contended that "the prosecution-prone character of 'death qualified' juries presented 'purely a legal question.'" *Witherspoon v. Illinois*, 391 U.S. at 517 n.11. He proffered these three studies for the first time in his brief to this Court. Thus, they had not been "subjected to the traditional testing mechanisms of the adversary process." *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring).

In that light, the *Witherspoon* Court stated it could "only speculate . . . as to the precise meaning of the terms used in those studies, the accuracy of the techniques employed, and the validity of the generalizations made." 391 U.S. at 517 n.11. The Court concluded that "[t]he data adduced by the petitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." *Id.* at 517. Although it declined to rely on these data, the Court invited "a defendant convicted by [a death-qualified] jury . . . in some future case [to] attempt to establish that the jury was less than neutral with respect to *guilt*." *Id.* at 520 n.18. Although writing separately, Justice White shared this view. *Id.* at 541 n.1 (White, J., dissenting).

Social scientists have responded to *Witherspoon*. They have produced research involving participants classified by more precisely stated, legally-relevant *Witherspoon* standards, under conditions that more closely approximated the real-life setting of the courtroom. This research, which we label in Table 2 as the post-*Witherspoon* behavior studies, included work by Jurow; Harris; and Cowan, Thompson & Ellsworth.⁹

⁹ Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971);

Table 2. Post-Witherspoon Behavioral Studies of Conviction-Proneness

Author	Jurors	Stimulus Materials	Death Qualifying Question	Results	Sig. Level ^a
Jurow ^b	211 persons, 1/3 former jurors	2 audiotapes of simulated murder trials	Appropriate WE questions	Jurors "not opposed" to DP more likely to convict	p < .01 (Case I) p < .10 (Case II)
Harris ^c	Nationwide random sample of 2068 adults	Written descriptions	Appropriate WE questions	As above	p < .0001
Cowan <i>et al.</i> ^d	288 jury-eligible & former jurors	Videotape of murder trial	Precise WE, GPI questions	As above	p < .01

^a See Table 1, note a.

^b Audiotapes included opening statements, examination of witnesses, closing arguments, jury instructions. Although Jurow found Case II only marginally statistically significant. Berry, *supra* note 4 at 20 nn.44, 45, argues that differences in both of Jurow's cases were statistically significant. See also Cowan *et al.* at 58, who used the same cases, and show that 44.7% of death-qualified jurors (DQs) vote to convict in Case I as compared with 33.3% of WEs; in Case II, 60% of DQs vote to convict compared to 42.9% of WEs.

^c In face-to-face interviews, jurors given 4 descriptions of criminal cases. In each case, DQs voted to convict more often than ALIs. Overall, DQs voted to convict in 63% of cases compared to 56% for WEs. DQs significantly more willing to ignore procedural safeguards to vote for conviction than ALIs.

^d See discussion in text.

The Jurow and Harris studies are subject to legitimate reservations. The WEs in both groups may have included Nullifiers. Because Nullifiers plainly may be excluded under the rule in *Witherspoon*, the failure to distinguish them may have created an overinclusive group. Moreover, neither Jurow nor Harris examined jury, as well as juror, behavior.

These two methodological gaps—whether GPIs differ in conviction rates from those who are death-qualified under *Witherspoon*, and whether the findings concerning juror behavior survive deliberation by juries—were filled in by Cowan *et al.*, the most sophisticated conviction-rate study to date. Participants were told to assume they were being called as jurors in a first degree murder trial and that the judge would ask them about their attitudes toward the death penalty. Each participant then was asked whether as a juror he/she would be unwilling to consider voting to impose the death penalty in any case. Those who answered unequivocally in the affirmative were classified as WEs, in the negative as death-qualified jurors (DQs). Then the participants were asked whether in the culpability phase they could follow the judge's instructions and decide the question of guilt or innocence in a fair and impartial manner based on the evidence and the law. Those who said they could not be fair and impartial in deciding culpability knowing that

Louis Harris & Associates, Inc., STUDY No. 2016 (1971) (unpublished manuscript), reported in White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1178 n.12, 1185, 1194 (1973) and discussed in *Hovey v. Superior Court*, 616 P.2d 1301, 1321 (1980); Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 L. HUM. BEHAV. 53 (1984) [hereinafter Cowan *et al.*].

Cowan *et al.* and several other studies to be discussed, *infra*, come from a special issue on death qualification in *Law and Human Behavior*, the journal of the American Psychology-Law Society, an APA division. For the convenience of the Court, nine copies of the journal have been lodged with the Clerk of the Court.

conviction might lead to the death sentence were classified as Nullifiers and excluded from the study. In this manner, 258 participants were identified as DQs and 30 as GPIs.

These remaining 288 participants, 104 of whom had actually served on juries, viewed a two and one-half hour videotaped reenactment of an actual murder trial.¹⁰ The judge and the attorneys, portrayed by an actual judge and two experienced criminal lawyers, read the entire original transcript of the trial and spontaneously improvised the reenactment. The case was complex and afforded several plausible interpretations and verdict preferences (first or second degree murder, voluntary manslaughter, accidental homicide, self-defense). The tape was pretested and judged as "convincing and realistic." Cowan *et al.*, *supra* note 9, at 64.

As soon as the taped presentation was completed, participants were asked to record how they would vote. The vote was used as the basic measure of predisposition to convict. All GPIs were then assigned to mixed juries composed of 8-10 DQs and 2-4 GPIs. These juries were told to deliberate for one hour. The deliberations were recorded on audio- and videotape. Jurors once again recorded their personal verdicts. This vote was used as the measure of post-deliberation proneness to convict. The results are indicated in Table 3.

Table 3. Verdict Choices of DQ and GPI Jurors in Cowan *et al.*

Verdict	Predeliberation Ballot		Postdeliberation Ballot	
	DQ	GPI	DQ	GPI
1st Degree	7.8%	3.3%	1.0%	3.4%
2nd Degree	21.3%	23.3%	17.3%	13.8%
Manslaughter	48.9%	26.7%	68.0%	48.3%
Not Guilty	22.1%	46.7%	13.7%	34.5%

¹⁰ The tape was prepared by Reid Hastie, Ph.D., an expert witness for respondent in the trial below, who used the tape in his research on the jury deliberation process. See R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* 47-51 (1983).

The difference between the DQ and GPI subjects on the pre-deliberation ballot are significant beyond the .01 level (1 in 100), indicating that DQ subjects are more likely than GPIs to vote guilty after viewing precisely the same trial. The post-deliberation personal verdict preferences permitted the researchers to test the robustness of jurors' initial verdict preferences after jury deliberation. The differences remained after deliberation and continued to be significant at the .01 level.¹¹

Two important findings emerge from the study, as inspection of Table 3 reveals. First, GPIs take their duties seriously and will vote to convict. Over one-half of them voted to convict of some degree of homicide prior to deliberation and an even greater proportion (65%) voted to convict after deliberation in mixed juries. Second, after deliberation the modal (most common) verdict among GPIs was manslaughter, the same as that for DQs, although GPIs acquittal rate remained significantly higher.

A legitimate criticism that may be made of the Cowan *et al.* study is that none of the juries deliberated to a verdict. Two factors attenuate any possible effects this factor may have had on the ultimate conclusions. First, research shows that jurors' initial vote preference predicts the jury's ultimate decision to a highly significant extent.¹² Second, these data are not idiosyncratic. They comport with the findings from all other studies, regardless of methodology, subjects, and stimulus materials.

¹¹ To assure that the results were not due to extraneous variables, the authors used a statistical procedure to discover whether factors other than attitudes toward the death penalty were associated with conviction rate. They found that age, education, prior jury experience, and employment status were unrelated to voting behavior.

¹² H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 488 (1966); see R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* (1983); M. SAKS, *JURY VERDICTS* (1977).

The research discussed in this section shows that death qualified juries act more favorably to the prosecution. In addition, there is a distinct and independent pro-prosecution effect created by death qualification during the *voir dire* process itself. All capital jurors experience the process of death qualification. Because many prospective jurors "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings," *Wainwright v. Witt*, 105 S. Ct. 844, 852 (1985), the *voir dire* process may be quite lengthy. In many jurisdictions *voir dire* occurs in the presence of other prospective jurors and can also be highly repetitive. Haney¹³ has studied the effects of *voir dire* on conviction proneness.

After WEs were excluded from the sample, Haney randomly assigned 67 jury-eligible adults to one of two experimental conditions. They watched either a two-hour videotape of a standard criminal *voir dire* including death qualification or an identical tape from which the death-qualification portion had been deleted. At the conclusion of the tapes, all subjects responded to a series of items designed to measure their attitudes and beliefs about the case whose *voir dire* they had just observed.

Those exposed to the death-qualification *voir dire* were significantly more conviction prone and were more likely to believe that the judge, the prosecution, and even the defense attorneys thought the defendant was guilty. Haney also found disturbing evidence of the effects of the death-qualifying *voir dire* on jurors' attitudes toward the appropriate sentence. Of the 32 jurors who heard an ordinary *voir dire*, only seven said that if the defendant were convicted of a capital crime, death was the appropriate penalty. Of the 35 jurors exposed to the death-

¹³ *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & HUM. BEHAV. 121 (1984) (lodged with the Court).

qualifying *voir dire*, 20 said that death would be the appropriate penalty.

In a parallel examination of actual capital *voir dire*, Haney¹⁴ found that judges and attorneys frequently lapsed into language even more prejudicial than that used in his experiment. They used phrases that made the verdict seem a foregone conclusion, such as, by the court: "When I instruct the jury at the end of this trial, I will outline in detail the factors to be weighed in deciding whether to impose a death penalty," *id.* at 138; and "There are two parts to this case," *id.* at 137; and by the prosecutor: "You know all [sic] that you are going to have to go through with the second phase," *id.* at 138.

In sum, a substantial, internally consistent body of research demonstrates that the exclusion of jurors who cannot accept capital punishment but who *can* be fair and impartial with respect to guilt, leaves a population of eligible jurors who are predisposed in favor of the prosecution as compared to population of citizens who comprise typical criminal juries. This basic conclusion is supported by three decades of accumulated research. It is uncontradicted by the results of any credible empirical study.¹⁵ Furthermore, a recent, methodologically rigorous study demonstrates that the death-qualification process during *voir dire* in capital cases creates further pro-prosecution biases.

¹⁴ *Examining Death Qualification*, 8 L. & HUM. BEHAV. 133 (1984) (lodged with the Court); see also Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQ. 512 (1980).

¹⁵ The only study that disputes these findings is Osser & Bernstein, *The Death-Oriented Jury Shall Live*, 1 U. SAN FERN. V. L. REV. 253 (1968). This study, not in evidence in this case, was discussed in *Hovey* where the court indicated that both defense and prosecution experts criticized its methodology. *Hovey v. Superior Court*, 616 P.2d 1301, 1325 n.80 (1980).

2. The data show barring of "Witherspoon Excludables" creates unrepresentative juries, thereby implicating defendant's right to a jury composed from a fair cross-section of the community.

The empirical evidence addresses three questions relevant to the Sixth Amendment requirement that a jury be chosen from a fair cross-section of the community. First, the evidence may yield information as to the size of each of the directly relevant groups, most particularly the WEs and their subsets—Nullifiers and GPIs. Second, it may reveal whether WEs share relevant attitudes, making them a distinct and cognizable subset of the population. Third, the evidence can inform us whether the exclusion of WEs results in underrepresentation of other distinct and cognizable groups on the jury, particularly blacks and women.

a. Death qualification excludes a significantly large subset of the population.

Given the wide time-span over which the studies were done and the different classifications used, no one number can define the proportion of WEs in the population, but the data are uniformly within a rather narrow range of 10-17%, supporting their reliability.¹⁶ Two surveys, using

¹⁶ Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970) [hereinafter Bronson I] (jury lists, 11% WEs; classification only approximated *Witherspoon* standard); Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 WOODROW WILSON L. J. 11 (1980) [hereinafter Bronson II] (author replicated study in California with a more legally relevant *Witherspoon* question and found 93% overlap of his "strongly opposed" group in Bronson I with WEs in Bronson II); Jurow, *supra* note 9 (nonrandom sample, 10% WEs; data likely to underestimate size of WEs in general population as author's sample 99% white and 80% male); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & HUM. BEHAV. 31 (1984) (random sample, 17% GPIs) [hereinafter Fitzgerald & Ellsworth] (lodged with the Court); Arkansas Archival Study (1981) (unpublished) cited at *Grigsby v.*

random samples and asking sophisticated *Witherspoon* questions, found that 11% and 17%, respectively, of subjects are classifiable as GPIs.¹⁷ In Arkansas, where McCree was tried, a review of *voir dire* transcripts revealed that WEs comprise 14% of venire members.¹⁸ All of these data were offered by respondent and subjected to cross-examination in the *habeas* proceedings below.¹⁹

b. Those excluded through death qualification share common attitudes on issues related to criminal justice.

Studies by Bronson (I & II), Harris, and Fitzgerald & Ellsworth²⁰ all demonstrate that jurors' attitudes toward the death penalty are systematically related to their ideological position on a broad spectrum of issues related to criminal justice. These studies used different methods of defining subjects on the basis of their death penalty attitudes, *e.g.*, "scrupled" vs. "nonscrupled"; "strongly

Mabry, 758 F.2d 226, 234 (8th Cir. 1985) (*voir dire* transcripts, 14% WEs); Precision Research Study (1981) (unpublished) discussed by trial court at 569 F. Supp. at 1294 and appellate court at 758 F.2d at 233 (random sample, 11% GPIs).

¹⁷ Precision Research Study, *supra* note 16; Fitzgerald & Ellsworth, *supra* note 16.

¹⁸ Arkansas Archival Study, *supra* note 16.

¹⁹ After listening to the testimony, the district court indicated it would "readopt[]" what it stated in its first '*Grigsby*' opinion concerning the size of the excluded group, adding only that the evidence presented at the hearing after remand reinforces the conclusion that the group [of WEs] is of substantial size both nationally and within the state of Arkansas." *Grigsby v. Mabry*, 569 F. Supp. at 1285.

²⁰ Bronson I, *supra* note 16 (718 persons drawn from jury lists asked 5 attitudinal items; participants favoring death penalty more likely to agree with pro-prosecution items; sig. level = $p < .001$); Bronson II, *supra* note 16 (755 members of venire in one survey and 707 in another interviewed regarding position on death penalty showed that those favoring death penalty more likely to support pro-prosecution positions); Harris, *supra* note 9; Fitzgerald & Ellsworth, *supra* note 16.

oppose" vs. all others; and some, the newest and most careful, compared DQs and WEs as defined by *Witherspoon*. All yielded the same conclusion: Those who are more favorable to the death penalty share attitudes toward criminal justice that are significantly more favorable to the prosecution.

Fitzgerald & Ellsworth is the most methodologically rigorous of the studies and exemplifies the nature of the attitudes investigated. The study was conducted under the auspices of an independent research firm that interviewed 811 randomly selected, jury-eligible participants. Interviewees were asked to indicate their position on the death penalty, from "strongly favor" to "strongly oppose." DQs and WEs were classified in precisely the same manner as in Cowan *et al.*, *supra* note 9, thus removing Nullifiers and permitting the researchers to compare DQs directly to GPIs. The 717 interviewees remaining after Nullifiers were removed then responded to 13 items designed to tap, *inter alia*, specific attitudes toward self-incrimination ("A person on trial who doesn't take the stand and deny the crime is probably guilty"); inadmissible evidence ("If the police obtain evidence illegally it should not be permitted in court, even if it would help convict a guilty person"; "Despite the judge's instructions to ignore a confession reported in the media but not in evidence, I would take the confession into consideration since it clearly indicates the defendant's guilt"); as well as feelings about opposing counsel ("District attorneys have to be watched carefully, since they will use any means they can to get convictions"; "Defense attorneys have to be watched carefully, since they will use any means to get their clients off").²¹

On all 13 items, DQs answered in such a way as to indicate attitudes more favorable to the prosecution than

²¹ These questions were carefully phrased. To reduce response bias and enhance the reliability of results, the direction of the items were balanced, so that those favoring prosecution and those favoring defense were in equal proportions.

GPIs. The differences in responses between the two groups were significant at the .05 level or beyond with respect to 11 items (four were significant beyond .001), marginally significant with respect to one item, and non-significant with respect to one. Conversely, GPI's responses were significantly different from DQs' responses on 11 of 13 questions, and less favorable to the prosecution on all 13. Combining the results from all 13 items into a general index of prosecution-proneness, the authors found a highly statistical significant difference in the proportion of pro-prosecution attitudes between DQs and GPIs ($p < .0001$). See *Hovey v. Superior Court*, 616 P.2d 1301, 1337 (1980). Thus, the data show that GPIs share common attitudes on relevant issues.²²

c. *Death qualification results in underrepresentation on juries of blacks and women.*

All the studies reporting relevant information²³ indicate that death qualification has strong racial and gender effects, decreasing the proportion of blacks and women eligible to serve as jurors during the culpability phase of the trial. Table 4 depicts the percentage of WEs or GPIs by race and gender, as revealed in these studies.²⁴

Table 4. Percent of Cognizable Groups Classified as WEs or GPIs *

Author	Black	White	Female	Male
Harris	46%	29%	37%	24%
Fitzgerald & Ellsworth	26%	16%	21%	13%
Precision Research	29%	9%	13%	8%

* In Harris, jurors classified as WEs; in other two, jurors classified as GPIs.

²² The evidence concerning attitudinal similarity is germane not only to the fair cross-representation issue but to the neutrality issue as well. The DQ process creates not only a less diverse jury, but insofar as pro-prosecution attitudes are related to conviction-proneness (and they appear to be), it creates a less than neutral jury as well. The studies should be read in that light.

²³ Harris, *supra* note 9; Fitzgerald & Ellsworth, *supra* note 16; Precision Research Study, *supra* note 16.

²⁴ See *Hovey v. Superior Court*, 616 P.2d 1301, 1337-1339 (1980) (collecting and summarizing data). These data comport with the

These indirect effects of death qualification on such cognizable groups pose independent constitutional problems. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972).

3. The data suggest that death qualification interferes with the proper functioning of the jury.

This Court has defined some of the attributes of a properly functioning jury—qualities that make for effective jury deliberation. It has emphasized thorough, accurate, impartial factfinding; robust debate; critical evaluation of testimony; “the counterbalancing of various biases”; and the correct comprehension and application of rules of law and the standard of reasonable doubt.²⁵ There is evidence that death qualification impairs these attributes.

Cowan *et al.*, *supra* note 9, studied two types of juries, one comprised totally of DQs and one comprised of 8-10 DQs and 2-4 GPIs (mixed). They found that those who had participated on the mixed juries were able, to a significant extent, to remember more of the facts and the evidence than those who served on DQ juries. Jurors who had participated in the mixed juries were more critical of both defense and prosecution witnesses than those who had served on the death-qualified juries.

extensive findings of Zeisel, *supra* note 7, which include data derived from three national Gallup polls conducted between 1960-1965 and from other researchers as well. See Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974); see also Smith, *A Trend Analysis of Attitudes Toward Capital Punishment, 1936-1974* in STUDIES OF SOCIAL CHANGE SINCE 1948 (J. Davis ed. 1976). Other demographic variables such as age, religion, and education are only weakly related to death penalty attitudes. See Fitzgerald & Ellsworth, *supra* note 16, at 35.

²⁵ *Ballew v. Georgia*, 435 U.S. 223 (1978); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). See generally R. HASTIE, S. PENROD, N. PENNINGTON, *INSIDE THE JURY* (1983).

Thompson, Cowan, Ellsworth & Harrington²⁶ showed participants a videotape of the conflicting testimony of a black defendant and a white police officer. To a highly significant extent ($p < .0002$), the death-qualified jurors were more likely than the excludable jurors to interpret the testimony as favorable to the prosecution. The exclusion of GPIs, therefore, seriously diminishes the opportunity for the presentation of conflicting views.

In this same research report, the authors suggest another mechanism that affects the proper functioning of the jury. They found that WEs felt that mistaken convictions were a more regrettable error than mistaken acquittals, while DQs did not differentiate the two. This indicates that WEs' attitudes may more properly fit the mandated asymmetry of the reasonable doubt standard.²⁷

Compared with the long history of research on neutrality and representativeness, the research on the effects of death qualification is quite recent, and as yet there are few studies. Nonetheless, the record is consistent, uncontroverted by the petitioner, and indicates that adding the distinctive perspective of GPIs may improve the performance of juries with respect to accurate factfinding, critical scrutiny of testimony, and the proper application of the standard of reasonable doubt.

II. CONTRARY TO THE STATES' CRITICISMS, WHICH ARE EITHER ERRONEOUS OR UNRELATED TO THE PERTINENT RESEARCH, THE SOCIAL SCIENCE DATA TENDERED BY RESPONDENT SATISFY APPLICABLE CRITERIA FOR EVALUATING THE SOUNDNESS OF SCIENTIFIC RESEARCH.

The States' advance what *amicus* construes as eight criticisms of the studies relied upon by respondent and

²⁶ *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 L. & HUM. BEHAV. 95 (1984) (lodged with the Court).

²⁷ Cf. *Addington v. Texas*, 441 U.S. 418 (1979); *In re Winship*, 397 U.S. 358 (1970).

discussed above.²⁸ *Amicus* concludes that none of these criticisms supplies a reason to disregard these studies.

1. *Proof Based on Statistically Significant Findings is Used by All Sciences and Endorsed by this Court.* The issue the States stress most is that social science evidence demonstrating that death-qualified juries are prosecution depends upon statistical significance as proof. Although the terminology is different, the underlying logic of significance testing has been known to the law for centuries and is useful in resolving empirical questions relevant to legal decisions, see *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977); *Castenada v. Partida*, 430 U.S. 482, 496 n.17 (1977), as it is in all other fields that are concerned with realities, not just abstract theories.

Significance levels, in fact, provide rigor and discipline for empirical researchers. When faced with data (evidence) that is arguably ambiguous, statistical decision theory requires that a "null hypothesis" be adopted as the starting point. The null hypothesis is an assumption of "no differences," equivalent to the legal presumption that the plaintiff's or prosecution's case is not proven until the evidence is submitted. The presumption will prevail if the data are insufficient to permit its rejection.

A significance level is, thus, the statistical equivalent of a legal standard of proof. It states the level of certainty the data must reach to reject the presumption of no differences. In most fields, social science included, that standard is set by convention at .05 or lower. In other words, if, after considering the evidence, the probability of an erroneous rejection of the null hypothesis is less likely than 1 in 20, then the null hypothesis can be rejected. This customary level of statistical signifi-

²⁸ APA believes these criticisms are a fair summary of the material contained in the States' briefs. See Brief for Petitioner at 40-50; Brief for *Amici Curiae* at 23-30. Criticisms 1 & 2 are contained in both briefs; criticisms 3, 4, 5, 6, & 8 come primarily from the petitioner; criticism 7 is unique to the *amici* States.

cance is roughly equivalent to proof beyond a reasonable doubt. As such, it is far more reliable than most evidence relied upon by the courts.

This Court has relied on tests of statistical significance to support the strength of empirical evidence in cases of fundamental constitutional dimensions, particularly with regard to juries. The Court has asked and answered empirical questions when deciding whether a selection system has unconstitutionally excluded minorities from petit juries, *Alexander v. Louisiana*, 404 U.S. 625 (1972); *Carter v. Jury Commission*, 396 U.S. 320 (1970), and grand juries, *Castenada v. Partida*, 430 U.S. 482 (1977). It has relied upon empirical evidence in determining whether reduced size affects the process or product of jury deliberation, *Ballew v. Georgia*, 435 U.S. 223 (1978); *Colgrove v. Battin*, 413 U.S. 149 (1973); *Williams v. Florida*, 399 U.S. 78 (1970), and whether nonunanimous juries deliberate or decide differently from unanimous juries, *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). In fact, tests of statistical significance are fundamental to research and decisionmaking in every empirical field in contemporary society.²⁹

2. *The Studies Measure Actual Behavior of Jurors, Not Only Their Attitudes.* Contrary to the States' assertion, the record is not limited to attitudinal studies.

²⁹ E.g.: Agriculture—R. MEAD & R. CURNOW, *STATISTICAL METHODS IN AGRICULTURE AND EXPERIMENTAL BIOLOGY* (1983); Business—P. JEDAMUS, *STATISTICAL ANALYSIS FOR BUSINESS DECISIONS* (1976); Economics—B. EASTMAN, *INTERPRETING MATHEMATICAL ECONOMICS AND ECONOMETRICS* (1985); Engineering—I. GUTTMAN, *INTRODUCTORY ENGINEERING STATISTICS* (3d ed. 1983); G. JACKSON, *DECISIONS UNDER CERTAINTY: DRILLING DECISIONS BY GAS AND OIL OPERATORS* (1979); Medicine—W. DANIELS, *BIostatISTICS: A FOUNDATION FOR ANALYSIS IN THE HEALTH SCIENCES* (1983); A. DELAUNOIS (ed.), *BIostatISTICS IN PHARMACOLOGY* (1979); E. MURPHY, *BIostatISTICS IN MEDICINE* (1982); Physics—R. KUBO, *STATISTICAL PHYSICS* (1985); and even law—D. BARNES, *STATISTICS AS PROOF: FUNDAMENTALS OF QUANTITATIVE EVIDENCE* (1983).

Zeisel found that death penalty attitudes, as revealed by a single question, predicted the votes of jurors in actual felony trials.³⁰ All of the studies in Tables 1 and 2, *supra*, measured actual votes in real or simulated cases, not just attitudes. Moreover, in all of the studies, juror attitudes *did* predict juror behavior.

There has been considerable controversy among social scientists about the *general* correlation between attitudes and behavior. In some contexts, for example, where there is strong cultural pressure to express certain attitudes, reported attitudes may be a poor predictor. In others, such as election polls, they are an excellent predictor. The major relevant findings are that attitudes are better predictors of behavior when people are forced to behave one way or another and cannot simply leave the situation, and when the relevance of the attitudes to the behavior is clear.³¹ These conditions are met in the jury context, which may explain the high correlation between attitude and behavior observed in all studies.

3. *The Findings are Not Based Solely on Simulations or Adversely Affected by "Misclassification."* Taken as a Whole, They are Demonstrably Reliable. The States claim the data are unreliable because they are based on simula-

³⁰ Zeisel's work has now been supported by Moran & Comfort, *Neither "Tentative" nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment*, 71 J. APPLIED PSYCHOL. (in press) [hereinafter Moran & Comfort]. The authors, studying actual jurors serving on capital juries, found a significant relationship between attitude toward death penalty and conviction proneness. According to the study, those who strongly favor the death penalty are more likely to be pro-prosecution, white, male, and politically conservative.

³¹ See Abelson, *Three Models of Attitude-Behavior Consistency* in 2 VARIABILITY AND CONSISTENCY OF SOCIAL BEHAVIOR: THE ONTARIO SYMPOSIUM 131 (M. Zanna, C. Herman, E. Higgins eds. 1982) [hereinafter Ontario Symposium]; Snyder, *When Believing Means Doing: Creating Links Between Attitudes and Behavior* in ONTARIO SYMPOSIUM.

tions. This criticism is not supportable. Two studies (Zeisel; Moran & Comfort) were based on post-deliberation interviews with actual jurors. Moreover, the simulation studies in the record are not unrealistic. A variety of stimulus materials have been used, ranging from written descriptions of cases, to half-hour audiotapes, to a highly realistic two and one-half hour videotape followed by a judge's jury instructions and jury deliberation. Moreover, as the simulations in the studies become more realistic, the differences between DQs and WEs become more pronounced. Apparently, any lack of realism in a given study has diluted the magnitude of the observed differences. Without credible exception, the substantial body of data supports the same conclusion.³²

The States' suggestions that researchers have misclassified some jurors as WEs or DQs and that such misclassifications have created spurious differences between groupings of jurors are likewise unsupported and untenable. The States complain particularly about studies classifying jurors on the basis of a single death-qualification question rather than a more extended *voir dire*. First, the method of classifying jurors has differed across studies (including those conducted by Dr. Shure, an expert witness for the State, *see* Brief for Petitioner at 44), with researchers varying the number and form of the questions without producing substantial changes in the numbers of jurors classified as WEs, GPIs, or DQs.

³² It would be theoretically possible to do a naturalistic experiment by simultaneously trying a capital defendant before a variety of juries, *e.g.*, some containing DQs only, some with GPIs only, some with mixed DQs and GPIs, and then assessing the relative tendency of these groups to convict or acquit. *See* Konecni & Ebbesen, *Social Psychology and the Law: The Choice of Research Problems, Settings, and Methodology in THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS* 27 (V. Konecni & E. Ebbesen eds. 1982). However, given three decades of consistent findings with a wide variety of stimulus materials, such an experiment would be only marginally useful. Moreover, this "ideal experiment" would raise serious practical, legal and ethical problems. Berry, *supra* note 4, at 5-6.

Second, if "misclassification" did occur in any study, it would yield *underestimates*, not overestimates, as implied by the States, of the true differences in conviction proneness among different groupings of jurors. To the extent DQs are misclassified as WEs, or vice versa, they will dilute the homogeneous character of each group, make the two groups more like each other, and thereby obscure real differences.

Third, the research by Haney, *supra* notes 13 & 14, demonstrates that the lengthy death qualification portion of *voir dire* adds a further prejudicial factor influencing death qualified juries against the defendant. Thus, if any effects on verdicts were produced by use of a full *voir dire* to classify jurors, it would be expected to increase, not decrease, observed empirical differences.

4. *Use of Diverse Methodologies Enhances the Reliability of the Research at Issue.* The States argue that the studies are suspect because researchers' use of different methods reveals a "lack of consensus" vitiating the reliability of the evidence. In fact, the variety of approaches used by investigators—all of which led to the same result—*reinforces* their reliability.

The use of diverse subjects, stimulus materials, and empirical methods does not reveal a "lack of consensus" but comports fully with the goal of "generalization," the accepted rubric for evaluating how far beyond the specific facts of any one particular study one can apply its findings. In making this evaluation, one must first consider whether the findings can be generalized across persons, *i.e.*, whether the subjects who participated in the research differ in important ways from the people to whom the research is being generalized. Next, one must consider whether the findings can be generalized across settings, *i.e.*, whether they apply in situations not directly involved in the study. Finally, one must consider whether findings can be generalized over time. Thus, the trustworthiness and generalizability of a study increases as independent investigators arrive at a common conclusion. The more

often a study confirms prior research or is confirmed by subsequent research and the more often a body of research with differing methodologies supports a common proposition, the less likely it is that chance fluctuations in the data or methodological anomalies account for the findings.³³

The studies reported here meet these tests. Regardless of the decade in which the research was done, the population studied, the stimulus materials used, the research design employed (retrospective interviews with actual jurors, national public opinion surveys, or increasingly sophisticated and controlled laboratory simulations), and regardless of the contemporary state of public opinion about the death penalty, the results have been the same—death-qualified jurors are more likely to convict than their "excludable" counterparts.

5. *The Findings Have Remained Remarkably Stable Over Almost 30 Years.* The States charge that the findings will change over time. The short answer is that the basic relationship between attitudes toward the death penalty and conviction proneness have remained markedly stable over three decades, from 1957 (Zeisel) to the present (Moran & Comfort). It is especially notable that the relationship has been robust regardless of whether, at the time the study was performed, the death penalty was popular or unpopular.

6. *ADPs Are So Small a Group That Their Absence Has no Impact on the Validity of the Findings.* Studies reveal that the prevalence of jurors who would always vote for the death penalty regardless of the evidence is exceedingly small,³⁴ ranging from 0.5% to 2%.³⁵ Statisti-

³³ See generally Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 133 U. PA. L. REV. (in press).

³⁴ See Louis Harris & Assoc., Inc., STUDY No. 814022 (1981) (0.7%); Arkansas Archival Study, *supra* note 16 (0.5%); Jurow, *supra* note 9 (2%).

³⁵ Gerald Shure, Ph.D., a psychologist expert who testified for the petitioner, stated during the trial that in a telephone survey

cal analysis based upon the data from these studies demonstrates that "taking the automatic death penalty jurors into account will have little impact on the findings" of Fitzgerald & Ellsworth and Cowan *et al.*³⁶

A related criticism concerns the fact that the studies compared death-qualified and excludable jurors, rather than death-qualified and typical criminal juries. Inevitably, juries composed of a mixture of death-qualified and GPIs jurors will fall somewhere between a jury composed solely of GPIs or DQs. Death-qualified jurors are more conviction prone than such mixed juries would be. Thus, the size of the difference between the pure WE and pure DQ groups in the research studies cannot be taken as an accurate estimate of the size of the difference between jury verdicts, although the existence and direction of the effect is clear from the studies. The precise magnitude of difference in a given case will change as a result of many variables, *e.g.*, quality of lawyering, first ballot verdict, number of WEs on mixed juries, strength of the evidence.

The research demonstrates that the composition of juries in terms of death penalty attitudes is an important variable and that over the long run eliminating GPIs will increase the number of guilty verdicts. The closer the case, the more the attitudinal and behavioral differences found between DQs and GPIs are crucial to the outcome. It is in close cases where neutral juries comprised

conducted in a wealthy area of West Los Angeles he found 33.3% of his sample to be ADPs. But the trial court criticized his methodology, indicated that Dr. Shure had himself acknowledged potential errors and omissions in his study, and concluded that the percentage of ADPs, both nationwide and in Arkansas, is negligible. 569 F. Supp. at 1307-1308. The Eighth Circuit agreed. 758 F.2d at 237-238. This Court has also concluded that such jurors "will be few indeed." *Adams v. Texas*, 448 U.S. 38, 49 (1980).

³⁶ Kadane, *After Hovey: A Note Taking into Account Automatic Death Penalty Jurors*, 8 L. & HUM. BEHAV. 115 (1984) (lodged with the Court); see Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure*, 78 J. AM. STAT. A. 544 (1983).

of jurors representing a fair cross-section of the community, who can critically and accurately evaluate the testimony and correctly apply the law, are most essential.³⁷

7. *It is Implausible that the Results are Products of Researcher Bias.* There is no support whatsoever for the States' claim that "researcher bias" produced the findings at issue. Because the findings converge across a wide variety of methods and have emerged from any laboratories, it is improbable that all the researchers share a common bias. In at least two cases (Harris; Fitzgerald & Ellsworth) the data were gathered by disinterested research firms whose livelihood depends on their reputations for impartiality. Perhaps most importantly, the data presented here have withstood trial in the twin crucibles of journal review by anonymous expert peers and the adversarial process of cross-examination in a courtroom. These independent procedures, from science and law, are designed to identify precisely the types of bias alleged by the States.³⁸

8. *Use of Adams/Witt, Rather than Witherspoon Standards Decreases the Death-Qualified Jury's Neutrality, Representativeness, and Effectiveness.* This Court's decisions in *Wainwright v. Witt*, 105 S. Ct. 844 (1985), and *Adams v. Texas*, 448 U.S. 38 (1980), clarified and broadened the permissible standard for exclusion of jurors developed in *Witherspoon*. This modification, however, does nothing to undermine the integrity of the findings presented here. In broadening the criteria for exclusion, *Adams/Witt* has the effect of removing from the jury

³⁷ The States' criticism concerning proper comparisons does not in any way affect the analysis of the data in regard to the Sixth Amendment requirements that juries must function properly and be comprised of a fair cross-section of the community. See pp. 16-21, *supra*.

³⁸ See *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983) ("We are unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence").

some additional number of jurors who are disinclined toward the death penalty, and transferring them from the DQ to the WE category. The result, then, is to make the death-qualified juries under the *Adams/Witt* rule even more different from normal criminal juries than they were under *Witherspoon*, e.g., less diverse, less able to properly evaluate the evidence, more pro-prosecution—all exacerbating the effects of death qualification on the fact-finding process at the culpability phase.

CONCLUSION

The data demonstrating that death-qualified juries are less than neutral with respect to guilt, unrepresentative, and ineffective as compared to normal criminal juries are now neither tentative nor fragmentary. The terms used in the relevant studies have been precisely defined. The techniques employed have been carefully articulated. The stability and convergence of the findings over three decades lend impressive support to their validity. The studies of the past decade, particularly, have closely approximated the real-life setting of the courtroom. Insofar as the social science data are relevant to the resolution of the constitutional issues at stake in this case, therefore, *amicus* believes they support affirmance of the decision below.

Respectfully submitted,

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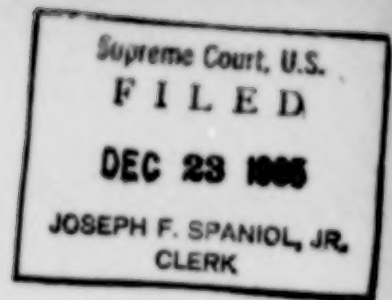
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BRIEF



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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

A. L. LOCKHART, Petitioner
v.
ARDIA V. McCREE, Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	11
Statement of Interest.....	2
Summary of Argument.....	4
Argument.....	7
Conclusion.....	20

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Beck v. Alabama</u> , 447 U.S. 625 (1980).....	12
<u>Brown v. Louisiana</u> , 447 U.S. 323 (1980).....	8
<u>Desist v. United States</u> , 394 U.S. 244 (1969).....	9, 10
<u>Grigsby v. Mabry</u> , 569 F. Supp. 1273 (1983) <u>aff'd</u> , <u>Mabry v.</u> <u>Grigsby</u> , 758 F.2d 226 (8th Cir.), <u>cert.</u> <u>granted</u> , <u>Lockhart v.</u> <u>McCree</u> , 106 S. Ct. 59 (1985).....	18
<u>Hovey v. Superior Court</u> , 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980)..	11
<u>Johnson v. New Jersey</u> , 384 U.S. 719 (1966).....	9
<u>Lockhart v. McCree</u> , 106 S. Ct. 59 (1985).....	passim
<u>Miller v. State of Arkansas</u> , 280 Ark. 551, 660 S.W.2d 163 (1983).....	19

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Powell v. Alabama</u> , 287 U.S. 45 (1932).....	13
<u>Reid v. Covert</u> , 354 U.S. 1 (1957).....	13, 14
<u>Solem v. Stumes</u> , 104 S. Ct. 1338 (1984).....	7
<u>Stovall v. Denno</u> , 383 U.S. 293 (1967).....	9
<u>United States v. Frady</u> , 456 U.S. 152 (1982).....	19
<u>United States ex rel. Clark v. Fike</u> , 538 F.2d 750 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977).....	11
<u>Wainwright v. Sykes</u> , 433 U.S. 72 (1977).....	17
<u>Williams v. United States</u> , 401 U.S. 646 (1971).....	7
<u>Witherspoon v. Illinois</u> , 391 U.S. 510 (1968).....	10
<u>Woodard v. Sargent</u> , 753 F.2d 694 (8th Cir. 1985).....	3

No. 84-1865

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

A. L. LOCKHART,
Petitioner

v.

ARDIA V. McCREE,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICUS CURIAE
IN SUPPORT OF THE RESPONDENT

STATEMENT OF INTEREST

Amicus Billy Junior Woodard ("Mr. Woodard") was convicted in 1976 of capital felony murder, and sentenced to death. Mr. Woodard was tried before a death-qualified jury similar to that utilized in the instant case. Following exhaustion of his state post-conviction remedies, Mr. Woodard petitioned the United States District Court for the Eastern District of Arkansas for a writ of habeas corpus, seeking relief on the same grounds at issue in this case. The district court denied Mr. Woodard's petition. On appeal the United States Court of Appeals for the Eighth Circuit granted Mr. Woodard's petition under the principle of the instant case (which it

had decided the day before). Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985).

The state filed a petition for writ of certiorari, which was opposed by Mr. Woodard. Sargent v. Woodard, No. 84-2028.

This Court's decision in the instant case will be dispositive of the merits of Mr. Woodard's claim under the Eighth Circuit's rule. In addition, seventeen states have urged reversal of the Eighth Circuit's decision in this case principally because of their concern that an affirmance might be applied retroactively; that argument may prompt the court to consider the issue of retroactivity in resolving the instant case. This amicus brief is directed solely at this issue.*

* Letters from the parties consenting to the filing of this brief are being filed with this brief.

SUMMARY OF ARGUMENT

None of the 33 state amici credibly argues that the Arkansas practice in dispute serves any important state function. Instead, for example, the Arizona amici principally assert that any retroactive invalidation of the practice would be harmful. (The Alabama amici paradoxically argue primarily that it is defendants who have the greatest interest in maintenance of the Arkansas practice.) It appears that had the instant method of selecting the guilt phase jury not been used in any prior case, and thus were no problems of retroactivity involved, the various states would in truth not balk at a resolution of this case in favor of respondent.

Obviously, Mr. Woodard believes that respondent should prevail and that such a ruling should be applied retroactively so as to void both Mr. Woodard's conviction and death sentence. The normal principles of retroactivity, as discussed below in more detail, support this belief.

However, the notion advanced directly and indirectly by the various state amici in their briefs -- that thousands of capital convictions ride on the result in Lockhart v McCree, 106 S. Ct. 59 (1985) -- is not necessarily accurate. What is true is that there are many ways in which retroactive application of the Eighth Circuit rule can be kept within limits deemed appropriate by this

Court. For example, a ruling for McCree could be given the limited retroactive effect of overturning the death sentences (as opposed to convictions) of defendants whom a state seeks to execute on the basis of an unconstitutional conviction. Under such a limited form of retroactivity, the states would be afforded the opportunity to choose either to retry the guilt and sentence phases of a death-sentenced individual or, alternatively, to alter the current sentence to a term of imprisonment otherwise in accordance with each state's law. As developed below, there are also other ways in which McCree may be applied retroactively on a limited basis. In short, because the state amici have misassessed both the merits and application of the law of retroactivity to

the issues presented in this case, there is no practical impediment to affirming McCree.

ARGUMENT

I

A Ruling For Respondent Should Be Applied Retroactively To Some Degree Under Applicable Cases

This Court has repeatedly held that constitutional principles designed to enhance the accuracy of criminal trials should be given retroactive effect. See, e.g., Solem v. Stumes, 104 S. Ct. 1338, 1342 (1984); Williams v. United States, 401 U.S. 646, 653 & n. 6 (1971). "When an assessment of ... probabilities indicates that the condemned practice casts doubt upon the reliability of the determinations

of guilt in past criminal cases... the new procedural rule [must] be applied retroactively." Brown v. Louisiana, 447 U.S. 323, 329 (1980) (holding retroactive the rule that the sixth and fourteenth amendments are violated if an accused is convicted of a non-petty criminal offense by a non-unanimous six-person jury). The argument for retroactive application of the principle adopted by the Eighth Circuit here is compelling. The issue -- whether death-qualified juries are impartial on the issue of guilt or innocence -- goes to the heart of the truth-finding function of a trial by jury.

The purpose of the constitutional doctrine is the most important factor in deciding whether to give it retroactive effect. Desist v.

United States, 394 U.S. 244, 249 (1969). Yet a decision on retroactivity depends on three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967); Johnson v. New Jersey, 384 U.S. 719, 727 (1966). Under this three-pronged test, some form of retroactive application of the McCree rule is appropriate.

This is especially true here because this case does not pose circumstances in which law enforcement officials have relied on an old,

established principle which no one could foresee this Court would overturn. Cf. Desist v. United States, 394 U.S. 244 (1969). On the contrary, in Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court expressly warned law enforcement authorities that the use of death-qualified juries to determine guilt or innocence might well be declared unconstitutional if it could be shown that those juries were in fact conviction-prone. 391 U.S. at 517-18, 520 n. 18. In the intervening years, appellate courts have also indicated that they would not hesitate to invalidate the use of a death-qualified jury at the guilt phase of a capital trial if more complete studies demonstrated that such juries

stacked the deck in the prosecution's favor. See, e.g., Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); United States ex. rel. Clark v. Fike, 538 F.2d 750, 761-62 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977).

Finally, contrary to the argument presented by the Arizona amici, retroactive application of the McCree doctrine in limited form could be implemented without overburdening the administration of justice, as discussed in greater detail below. The doubts which an affirmance would necessarily raise about the accuracy of past verdicts, regardless of whether sufficient to warrant retroactivity in all cases, are surely

sufficient at least to require retroactive application wherever a state seeks to put a defendant to death on the basis of a verdict obtained in this unconstitutional manner.

This Court has consistently held that the degree of possible error tolerable in a capital case is far smaller than in an ordinary criminal proceeding. As this Court explained in Beck v. Alabama, 447 U.S. 625, 637-38 (1980):

[T]he risk of an unwarranted conviction... cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments.... **** To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to

diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.

In Powell v. Alabama, 287 U.S. 45 (1932), for example, at a time when other criminal defendants did not enjoy a constitutional right to appointed counsel, this Court extended that right to defendants in capital cases, emphasizing "above all that they stood in deadly peril of their lives." 287 U.S. at 71.

Further, in Reid v. Covert, 354 U.S. 1 (1957), which declared unconstitutional the trial before a military court of a civilian charged with a capital offense, Justices Frankfurter and Harlan expressly limited their grounds for concurrence to capital cases. Justice Harlan admonished, "I do not concede that

whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case", 354 U.S. at 77, and Justice Frankfurter emphasized: "It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights." 354 U.S. 45-46.

The degree of possible inaccuracy which death qualification has injected into trials of guilt or innocence is too great to permit a state to execute a defendant so convicted. The Eighth Circuit rule in this case should be applied retroactively at the very least to the cases of inmates under sentence of

death, and such a limited rule of retroactivity could be manageably administered, as set forth in more detail below.

II

An Affirmance Of McCree Is Not At Odds With The Practical Requirements Of Administering Justice

The concerns raised by the state amici are both overstated and premature. At most, they point to a tension in this case between the goals of a reliable fact-finding process on the one hand, and efficient administration of the justice system on the other. A compromise between competing concerns is not impossible. Indeed, several middle courses are available.

First, the rule of this case might be applied only to defendants now under sentence of death. (Because most of the prisoners who were convicted by death-qualified juries are not now under a sentence of death, such limited retroactivity would not threaten the administration of justice.) A retrial on the merits would be required only if a state insisted on seeking to execute the defendant. The state would have that option, and would retain the ability to continue to seek the death penalty wherever it wished to do so. On the other hand, such a limited retroactivity rule would never result in the freeing, over the objection of the state, of any convicted inmate; a state would always be

free to moot the Lockhart v. McCree, 106 S. Ct. 59 (1985), issue by agreeing not to execute a particular defendant. In all cases the choice would remain with the state, which in each instance could base its decision whether to seek a retrial on the potential difficulty of retrying a particular defendant, the strength and weaknesses of its case, and any other appropriate circumstances. Whatever the burdens and inconveniences of a retrial, it would always be within the power of a state to avoid those difficulties simply by agreeing that a defendant's sentence should be changed to a term of imprisonment.

Second, the rule of Wainwright v. Sykes, 433 U.S. 72 (1977), could be applied so as to limit severely any

retroactive impact of the rule adopted by the Eighth Circuit in this case. Construction of the doctrine of "cause and prejudice" in the context of the McCree case may be made sufficiently narrow to avoid reversal of any substantial number of sentences on habeas corpus review. In fact, the Arkansas District Court limited the retroactive impact of its decision when it decided that Dewayne Hulsey, whose petition was joined with Grigsby's and McCree's on this issue, was procedurally barred from taking advantage of the court's decision in Grigsby. Grigsby v. Mabry, 569 F. Supp.1273 (1983) aff'd, Mabry v. Grigsby, 758 F.2d 226 (8th Cir.), cert. granted, Lockhart v. McCree, 106 S. Ct. 59 (1985).*

* Mr. Hulsey's appeal is presently pending before the Eighth Circuit.

In United States v. Frady, 456 U.S. 152, 170-172 (1982), this Court reaffirmed that a showing of actual prejudice requires a federal habeas petitioner to demonstrate that his claim of innocence at trial was colorable. Only those petitioners who can establish the requisite possibility of innocence will be afforded the benefit of the McCree rule. The showing of actual prejudice required to raise a McCree claim or federal habeas can be made very strict, as the Frady requirement that petitioner has raised a colorable defense at trial can be applied strictly to the circumstances created by application of the doctrine at stake here. For example, retroactive application might be unavailable in a case such as Miller v. State of Arkansas, 280 Ark. 551, 552, 660

S.W.2d 163, 164 (1983) (murder conviction affirmed), in which the Arkansas Supreme Court found the evidence of the appellant's guilt "not only substantial but convincing."

Under this approach, retroactive effect might not be given to McCree with respect to those cases in which the prisoner had not placed his guilt in some specified degree of doubt, as, for example, by having raised a close question concerning guilt at trial. Such a standard would have the effect of narrowing any disruption of the system of justice.

CONCLUSION

Compromises between the two fundamental objectives of fair, accurate trials and the efficient administration of

our system of justice can be fashioned by this Court, or the lower courts. In this case, the Eighth Circuit's substantive rule should be adopted by this Court.

December 23, 1985

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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NO. 84-1865

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OCTOBER TERM, 1984

A. L. LOCKHART

Petitioner

V.

ARDIA V. MCCREE

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	111.
BRIEF OF AMICI CURIAE	1
INTEREST OF AMICI CURIAE	1
CONSENT TO FILE GRANTED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT AND AUTHORITIES	9
 I. CAPITAL TRIALS ARE BIFURCATED IN RECOGNITION OF THE TWO SEPARATE ISSUES TO BE DECIDED: THE FACTUAL ISSUE OF GUILT AND THE MORAL-ETHICAL ISSUE OF PUNISHMENT.	 9
 A. The First Phase--A Factual Determination of Guilt or Innocence.	 10
 i. Death qualification im- pinges jury deliberations and results in a jury that is, on average, conviction prone.	 13
 B. The Second Phase--What Punish- ment Does This Defendant Deserve?	 14

i.	Death qualification taints the sentencing function by alternatively 1) "produc[ing] a jury uncommonly willing to condemn a man to die" <u>Witherspoon v. Illinois</u> , 391 U.S. 510, 521 (1968), or 2) leaving on the jury persons who are incapable of applying the death penalty in a proper case.	16
II.	WEs ARE NOT VERDICT NULLIFIERS: THEY ARE ABLE TO IMPARTIALLY DETERMINE GUILT OR INNOCENCE.	20
III.	WEs WOULD PLAY AN IMPORTANT ROLE IN JURY DELIBERATIONS AND SHOULD BE ALLOWED TO SERVE.	28
IV.	THE STATE'S INTEREST IN CAPITAL PUNISHMENT IS BETTER SERVED BY CHANGES IN THE SENTENCING PROCEDURE.	31
	SUMMARY	33
	CONCLUSION	34

TABLE OF AUTHORITIES

CASES:	PAGE
<u>Adams v. Texas.</u> 448 U.S. 38 (1980)	26
<u>Apodaca v. Oregon.</u> 406 U.S. 404 (1972)	11
<u>Ballard v. United States.</u> 329 U.S. 187 (1946)	11
<u>Ballew v. Georgia</u> 435 U.S. 223 (1978)	11, 14, 28, 30
<u>Beck v. Alabama.</u> 447 U.S. 625 (1980)	15
<u>Duncan v. Louisiana.</u> 391 U.S. 145 (1968)	11
<u>Duren v. Missouri.</u> 439 U.S. 357 (1979)	11, 24
<u>Eddings v. Oklahoma.</u> 455 U.S. 104 (1982)	15
<u>Gregg v. Georgia.</u> 428 U.S. 153 (1976)	15, 17
<u>Grigsby v. Mabry.</u> 569 F.Supp. 1273 (E.D.Ark. 1983)	22, 31
<u>Grigsby v. Mabry.</u> 758 F.2d 226 (8th Cir. 1985)	6, 23, 27
<u>Hovey v. Superior Court.</u> 28 Cal.3d 1. 616 P.2d 1301, 168 Cal. Rptr. 1238 (1980) iii.	30

<u>Johnson v. Louisiana.</u> 406 U.S. 356 (1972)	11
<u>Jurek v. Texas.</u> 428 U.S. 262 (1976)	15
<u>Keeten v. Garrison.</u> 578 F.Supp. 1164 (W.D.N.C.), <u>rev'd</u> , 742 F.2d 129 (4th Cir. 1984)	30
<u>Keeten v. Garrison.</u> 742 F.2d 129 (4th Cir. 1984)	21
<u>O'Brien v. Estelle.</u> 714 F.2d 365 (5th Cir. 1983)	11
<u>Patton v. Yount.</u> 104 S.Ct. 2885 (1984)	25
<u>Pierre v. Louisiana.</u> 306 U.S. 354 (1959)	10
<u>Spaziano v. Florida.</u> 468 U.S. _____, 82 L.Ed.2d 340 (1984)	32
<u>Spinkellink v. Wainwright.</u> 578 F.2d 582 (5th Cir. 1978), <u>cert. denied.</u> 440 U.S. 976 (1979)	11, 20, 26
<u>Strauder v. West Virginia.</u> 100 U.S. 303 (1880)	10
<u>Taylor v. Louisiana.</u> 419 U.S. 522 (1975)	10, 12, 29
<u>Thiel v. Southern Pacific Co..</u> 328 U.S. 217 (1946)	10

<u>Wainwright v. Witt.</u> 105 S.Ct. 844 (1985)	passim
<u>Williams v. Florida.</u> 399 U.S. 78 (1970)	11,12
<u>Witherspoon v. Illinois.</u> 391 U.S. 510 (1968)	passim
<u>Zant v. Stephens.</u> 103 S.Ct. 2377 (1983)	15

SECONDARY AUTHORITIES

<u>Casenote. Grigsby v. Mabry.</u> 54 UMKC L.Rev. 122 (1985)	6,23
Finnical. Strategy and Tactics in the Jury Selection Process in Death Penalty Cases, A Prosecutor's Perspec- tive (1985)(Mo Attn'y Gen. Office)	13
Winick. Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitu- tional Analysis. 81 Mich. L. Rev. 1 (1982)	17

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are practitioners in the criminal justice system and, as prosecutor and defense counsel, appear in the trial courts of Missouri to represent the State and defendants, and may be able to assist this Court in considering the issues in the case below. While as individuals, amici disagree on the wisdom and constitutionality of capital punishment, for the purposes of this case we concede the general propriety of that penalty.

However, the present system of death qualification

distorts the jury function; does not adequately protect the defendant's right to a representative cross-sectional jury; and does not adequately protect the state's interest in a sentencer able to rationally and consistently impose the penalty of death.

PURPOSE OF AMICI BRIEF

Amici's purpose in this brief is to deal with the practical effect of the decision below. The elimination of the death qualification process will improve the deliberative function of the jury in the finding of guilt or innocence; and will require the States to adopt a sentencing scheme more capable of rationally imposing punishment. Amicus has communicated with counsel for Petitioner and Respondent in an effort to avoid undue duplication. It is believed that this brief addresses the practical implications of the case at bar in a manner that will not be done by either Petitioner or Respondent.

IMPORTANCE OF THE ISSUES ADDRESSED

The Witherspoon-Witt voir dire process

[Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 105 S.Ct. 844 (1985)] consumes a disproportionate amount of time and effort in the trial and appeal of capital cases and fails to accomplish its purposes. The holding below eliminates this problem by removing this portion of the voir dire, returning it to its proper function--to elicit views, feelings, and attitudes from the venirepersons that might interfere with their ability to be fair and impartial in determining guilt or innocence.

CONSENT GRANTED TO FILE AMICUS BRIEF

The request to file this amicus curiae brief has been granted by Arkansas Attorney General John Steven Clark for the Petitioner and by John Charles Boger, attorney for the Respondent.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case made by the Petitioner.

INTRODUCTION

While the issue addressed in the instant case relates to the Sixth Amendment right to a representative, impartial jury, its real significance is revealed against the backdrop of capital punishment. Because of this, it is not surprising to find the lines (and briefs) drawn according to interests of prosecution and defense, crime control and due process, death penalty and abolition.

Amici represent both sides of the line: prosecutor and defense attorney. And both agree that permitting death qualified juries to operate as they do in Arkansas is detrimental to the sound administration of the homicide laws and inconsistent with the requirements of the Sixth and Fourteenth Amendments.

For the prosecutor, death qualification gives an unneeded advantage in the first phase of the capital trial. In the second phase, death qualification fails in creating a sentencing jury consistently able to impose the death sentence on those criminals most deserving

of the punishment.

For the defense attorney, death qualification creates a conviction prone jury in the first phase. In the second phase, it results in a jury that chooses punishment arbitrarily--sometimes to the benefit of a defendant, sometimes to his detriment.

In the adversary process, it is easy to lose sight of the possibility that the status quo can change without either side losing. This is true in the instant case. Empirical evidence compels this Court, as it did the Court of Appeals, to look anew at the voir dire process in capital trials.

Prosecution and defense alike have long believed that the capital jury selection process results in a jury that is prosecution prone. Because of footnote dicta in Witherspoon v. Illinois, 391 U.S. 510 (1968), such a jury has been accepted as one that is as fair as it can be, despite the large number of venirepersons excluded from jury service by their refusal or inability to consider the imposition of death. The Eighth Circuit

decision below in Grigsby v. Mabry, 428 F.2d 525 (8th Circuit 1985) provides this Court with an opportunity to reexamine the death qualification process upon consideration of empirical evidence and in light of a bifurcated capital trial not at issue in Witherspoon.

SUMMARY OF ARGUMENT

It is expected that Petitioner's and Respondent's briefs will thoroughly discuss the case law and the empirical evidence presented in the courts below. This brief does not intend to repeat arguments of the parties. Rather, it deals with the practical effect of the death qualification process on the interests of the state and the defendant.

Capital trials are bifurcated in recognition of the two distinct functions performed by the jury: the factual determination of guilt or innocence and the moral-ethical issue of punishment. See, Casenote, Grigsby v. Mabry, 54 UMKC L.Rev. 122, 136-42.

This dual function of the jury--fact finder and

sentencer--creates the conflict before this Court: the defendant's right to a fair finding of fact as to guilt or innocence, and the state's right to a fair determination of sentence.

The overwhelming empirical evidence found below demonstrates that the current approach to this conflict--death qualification--does not serve its purpose and has corrupted the jury system. By excluding WEs (see infra note 6), current death qualifying procedures inhibit the jury's deliberative function in the first phase; and do not properly protect the state's interests in rational and consistent sentencing in the second phase.

Death qualification focuses on the second function of the jury: the issue of punishment. Yet death qualification consistently fails to impanel for the sentencing phase a jury able to rationally and consistently impose the sentence of death. Because a venireperson's responses during death qualification do not reflect with complete accuracy that individual's views, the imposi-

tion of capital punishment is arbitrary. A venireperson's ability to consider the punishment of death in the abstract, but inability to impose that punishment in any concrete case, frustrates the state's legitimate interest in capital punishment.

The result is a confusing, frequently challenged voir dire process that forces the defendant to trial before an unrepresentative, conviction prone jury; and forces the state to submit the penalty issue to a jury whose decision can be nullified by a single juror whose inability to truly consider a sentence of death escaped the prosecutor's notice by not appearing or surfacing during voir dire. The judgment below should be AFFIRMED to enhance the accuracy of both phases of the capital trial.

ARGUMENT

- I. CAPITAL TRIALS ARE BIFURCATED IN RECOGNITION OF THE TWO SEPARATE ISSUES TO BE DECIDED: THE FACTUAL ISSUE OF GUILT AND THE MORAL-ETHICAL ISSUE OF PUNISHMENT.

The jury serves its traditional function in the guilt-phase of a capital trial--the factual determination of guilt or innocence. In the penalty phase, the function of the sentencer is to decide what is fair or just. The mental process employed by jurors in each phase is different. That is why an individual juror who is adamantly opposed to capital punishment can be fair and impartial in deciding guilt.¹ The two functions are qualitatively different.

-
1. The empirical evidence shows that a large percentage of individuals unable to impose capital punishment can, nonetheless, fairly determine guilt or innocence. Most individuals opposed to capital punishment base their belief on philosophical, moral, or religious grounds. The determination of guilt or innocence, on the other hand, is grounded upon a factual finding from the evidence. It is, therefore, not surprising to find a juror unable to vote for capital punishment able to determine guilt or innocence.

A. The First Phase--A Factual Determination of Guilt or Innocence.

In the first phase of the trial, the jury is called upon to find the facts. In a litany of cases, this Court has given meaning to the jury right guaranteed by the Sixth and Fourteenth Amendments. Trial by jury is fundamental to the American scheme of justice. Among other things,² it provides an accused with an inestim-

2. The jury serves purposes and functions for the jurors as well. Jury service is a democratic concept, "a privilege of citizenship" Thiel v. Southern Pac. Co., 328 U.S. 217, 224 (1946). "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." Taylor v. Louisiana, 419 U.S. 522, 530 (1975). Indeed, there exists an independent due process right for qualified citizens to be included in the jury process. Strauder v. West Virginia, 100 U.S. 303, 310 (1880). "[T]rial by jury cease[s] to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races--otherwise qualified to serve as jurors in a community--are excluded as such from jury service." Pierre v. Louisiana 306 U.S. 354, 358 (1959) (emphasis added).

One of the most striking aspects of the current death qualification process is the number of good, qualified venirepersons barred from service because of their views on capital punishment. Although they

able safeguard against the overzealous prosecutor or biased judge. Duncan v. Louisiana, 391 U.S. 145, 149, 156 (1968).³ The essential feature of a jury lies in the interposition between the accused and his accuser of the common-sense judgment of a cross-section of the community, able to deliberate on the question of the defendant's guilt. Williams v. Florida, 399 U.S. 78 (1970); Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972); Johnson v. Louisiana, 406 U.S. 356, 362 (1972).

This Court has recognized that the fact finding function of the jury requires group deliberation. In forbidding the exclusion of distinctive groups, Duren v. Missouri, 439 U.S. 357, 364 (1979), Taylor v. Louisiana,

"state unambiguously that they could fairly judge [the defendant's] guilt or innocence" (Spinkellink v. Wainwright, 578 F.2d 582, 592 (5th Cir. 1978)) they are presumed to be "lying" jurors (O'Brien v. Estelle, 714 F.2d 365, 406 (5th Cir. 1983) (Buchmeyer, J., dissenting)).

3. One of the concerns with the present capital scheme employed by Arkansas is that an "overzealous prosecutor" has unguided discretion to procure a prosecution prone jury merely by whimsically elevating the crime charged to a capital level.

419 U.S. 522, 530-32, Ballard v. United States, 329 U.S. 187, 193-94 (1946), the importance of group deliberation has been underscored. Even though the exclusion of a group might not make one iota of difference in any particular case, group attitudes and "the subtle interplay of influence[s] one on the other", Taylor, 419 U.S. at 531-32 (quoting Ballard, 329 U.S. at 194) are important in the deliberative process and should not be purposely removed by the procedures employed by the courts during voir dire.

If the deliberative function is preserved, the jury has fulfilled its constitutional purpose as fact finder, even when acting without unanimity, without twelve jurors, or without members of the defendant's particular peer group. Ballew v. Georgia, 435 U.S. 223, 239 (1978); Williams v. Florida, 399 U.S. 78 (1970).

i. Death qualification impinges upon jury deliberations and results in a jury that is, on average, conviction prone.

The empirical evidence presented in the cases below confirms what trial lawyers and judges have known for years: death qualified juries tend to favor the prosecution. Tim M. Finnical, an assistant attorney general with the Missouri Attorney General's Office, delivered a paper on death qualification at the state-wide meeting of Prosecuting Attorneys December 5-7, 1985. In *Strategy and Tactics in the Jury Selection Process in Death Penalty Cases, A Prosecutor's Perspective* (1985)(cited as Strategy)(available from Missouri Attorney General's Office). Mr. Finnical notes the power of death qualification:

[I]n the hands of a prepared state's attorney the death penalty jury selection process as in no other type of criminal case holds the ultimate weapon, the edge for maximum success. The voir dire in death cases gives you the prosecutor certain unique opportunities to apply effective tactics which are unavailable in other criminal cases.

Id. at 2.

It is ironic that the only time a defendant will be

subjected to a jury that trial attorneys and judges know and overwhelming empirical evidence shows is, on average, conviction prone, is when his life is at issue--a time when it is most important that the jury start from a position of scrupulous neutrality in its ability to reach a proper verdict. Even a misdemeanor is guaranteed an impartial jury drawn from a cross-section of the community. Ballew, supra (misdemeanor obscenity prosecution). Yet, the capital defendant, as in no other type of criminal case, is subjected to "the ultimate weapon, the edge for maximum success"--a jury prone to convict. (Quoting from Strategy, supra.)

B. The Second Phase--What Punishment Does This Defendant Deserve?

Sentencing in any criminal trial involves a different process than the determination of guilt. While guilt is a factual finding, punishment is a question of what is fair and just. What does this defendant deserve? Recognizing that "there is a significant constitutional difference between the death penalty and

lesser punishments." Beck v. Alabama 447 U.S. 625, 637 (1980), this Court has required that the sentencer in a capital trial, be it judge, jury, or both, "have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

The qualitative difference of the death penalty requires that it not be applied arbitrarily or discriminatorily. Gregg v. Georgia, 428 U.S. 153, 188 (1976)(opinion of Stewart, Powell, and Stevens, JJ.). To aid in "measured, consistent application and fairness to the accused," Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982), the facts and circumstances of the individual and his crime must form the basis for choosing from among the many criminal defendants the few who are sentenced to death. Zant v. Stephens, 103 S.Ct. 2377 (1983). Additional information is required because punishment is not a finding of fact and is not determined by the same mental process as is guilt or

innocence.

1. Death Qualification Taints the Sentencing Function by Alternately: 1) "produc[ing] a jury uncommonly willing to condemn a man to die" Witherspoon v. Illinois, 391 U.S. 510, 521 (1968), or 2) leaving on the jury persons who are incapable of applying the death penalty in a proper case.

The first effect of death qualification is that jurors with "conscientious scruples" against capital punishment are identified. After striking WEs for cause (even those who unambiguously state under oath that they can be fair and impartial),⁴ prosecutors routinely use peremptory challenges to remove jurors with mere scruples against the death penalty. Countless voir dire transcripts bear witness to this practice, the empirical

4. See infra page 26 (quote from Spinkellink).

evidence below confirms the conviction prone effect, and Witherspoon condemns the ultimate result--a jury uncommonly willing to vote for capital punishment. The process found unconstitutional in Witherspoon is merely delayed--from the stage of challenges for cause to the stage of peremptory challenges.⁵

The second effect of death qualification is the frustration of the state's interest in picking a jury capable of administering the death penalty rationally. While prosecutors endeavor to eliminate jurors unable to impose the sentence of death, the process can rarely be entirely accurate. Because death qualification can not, with complete accuracy, identify jurors unable to impose the death penalty, and because Gregg capital

5. See generally Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1 (1982)(finding Florida prosecutors systematically exclude mildly scrupled jurors in capital cases by peremptory challenges after first striking WEs for cause).

sentencing schemes routinely require a unanimous sentence, proper sentencing decisions are frequently frustrated by a single juror.

In states requiring jury unanimity to impose the sentence of death, the results are arbitrary. A heinous crime, committed by a defendant who justly deserves the death penalty, is punished with life imprisonment because one or more jurors refuse to vote for death. Another defendant, who encounters a jury truly death qualified, is sentenced by a jury "uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. at 521. The capital voir dire process is simply not refined enough to obviate the idiosyncratic results so ever-present in capital sentencing throughout the country.

The death qualification process falls woefully short of its purported purpose: fair and consistent application of the death penalty. It makes the sentencing phase less accurate and rational. Either the state is not provided with a jury capable of returning

the death penalty in the appropriate case, or the defendant is tried by a jury effectively purged of all jurors with mere conscientious scruples against the sentence of death.

Any perceived saving of time or money in using a single jury capital scheme is not justified by any real benefit to the state. Instead, the present capital scheme saddles the community with a sentencing jury often incapable of assessing a proper punishment.

II. WEs ARE NOT VERDICT NULLIFIERS: THEY ARE
ABLE TO IMPARTIALLY DETERMINE GUILT OR
INNOCENCE.

A recurrent concern among prosecutors is that unless WEs are excluded, they will act as nullifiers in the guilt phase of the trial. If the two alternatives in a capital trial are 1) a jury without WEs that is conviction prone, or 2) a jury that includes WEs who will upset or nullify the verdict because they cannot be fair and impartial, most observers would undoubtedly agree that a jury with "proneness" is better than a jury with actual bias. Though in reality unfounded, the nullifier concern has been the focus of consideration by courts of the Sixth Amendment issue raised below.

In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), the Fifth Circuit, without the benefit of empirical evidence or, indeed, any evidentiary hearing, commented that:

Florida apparently has concluded that, if for whatever noble reason--religious conviction, philosophical posture, intellectual stance, or some other reason --a venireman clings so steadfastly to

the belief that capital punishment is wrong that he would never under any circumstances agree to recommend the sentence of death, it is entirely possible--perhaps even probable--that such a person could not fairly judge a defendant's guilt or innocence when a capital felony is charged.... Florida has reasoned that a person may so cherish his conscientious scruples against the death penalty that he would favor the acquittal of a defendant charged with a capital felony.... Id. at 595-96 (emphasis in original).

In Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), the Fourth Circuit ignored the evidence presented to the district court and posited its own finding of fact: "[M]embers of the venire who are irrevocably opposed to capital punishment would engage in jury nullification if permitted to sit at the guilt stage of a capital case and, therefore, would not be impartial fact finders." Id. at 133.

These fears are unfounded. Although courts have assumed WEs will act as nullifiers, the evidence presented below unequivocally proves that WEs can be fair and impartial in determining guilt or innocence, yet they are denied the chance to serve.

The evidence--emphasized and repeated again and

again--is that between 11% and 17% of the venire is made up of WEs who can be fair and impartial. This is the core finding of the courts below. Yet it is either ignored or misunderstood by Petitioner, who misdefines WEs so as to ignore the fact that a majority of those excluded under Witherspoon can be fair and impartial.⁶

6. The definition of "WEs" has been narrowed since 1968. Following Witherspoon, any venireperson unable to consider capital punishment was excluded. In Grigsby, the district court noted that "all 'Witherspoon Excludables' (WEs) may be divided into 'Nullifiers' and 'Guilt Phase Includables.'" Grigsby v. Mabry, 569 F.Supp. 1273, 1291 (E.D.Ark. 1983).

The term "nullifier" is used to describe a juror who states that he would be unable to try the issue of the defendant's guilt/innocence upon the basis of the evidence and the law. In the death-penalty context this is the person who would say, "I cannot vote a defendant guilty regardless of the evidence if I know that, should he be convicted, someone else [the court or some other jury] might impose the death penalty...." It is, of course, agreed by all that "nullifiers" are properly excluded from both the guilt/innocence phase and the sentencing phase of a capital case.

Id. at 1290-91.

In the district court and 8th Circuit opinions, and as frequently repeated in this brief, the above distinctions are noted. WEs are defined as those Witherspoon excludables who can be fair and impartial.

This misdefinition obscures the evidence that out of every 100 venirepersons, 21 would be excluded under Witherspoon, yet as many as 17 of these 21 would be fair and impartial.⁷ It is essential to understand this fact: death qualification removes nearly one-fifth of those venirepersons who can be fair and impartial.⁸

7. The 17% figure in the court's finding of 11-17%, Grigsby, 758 F.2d at 231, is taken from the studies compiled in 8 Law & Hum. Behav. 1 (1984) which give additional statistics on the venire and show that approximately 21% of the venire is excludable under Witherspoon.

8. The Brief of Amici reiterates the misdefinition of WEs:

Many of the 11% to 17% would be excluded under the court's own holding, because they not only would be unable to assess a sentence of death but also would be unable to find guilt without bias in a capital case. The actual number at issue must necessarily be considerably smaller and more difficult to determine"

Brief of Amici by Crump at 12 n.11.

This shows a fundamental misunderstanding of the evidence. Excluding nearly one-fifth of the fair and impartial venirepersons affects the makeup of the jury. On a twelve person jury, on average, two fair and impartial WEs are replaced with two death qualified jurors. For an explanation of the effect on the jury when WEs are replaced with death qualified jurors, see, Casenote, Grigsby v. Mabry, 54 UMKC L.Rev. 122, 141-42 (1985).

This attempt to identify and remove nearly one-fifth of the jury panel brings into sharper focus the effect of death qualification upon the jury, both in terms of the imbalance against the defendant and the difficulty in impanelling a sentencing jury capable of unanimity.

The district court's finding was that 11-17% of the qualified venire represented WEs who could be fair and impartial. When this large block of venirepersons is removed, the resulting jury is conviction prone.⁹

9. Another source of confusion is Petitioner's improper distinction between "jurors" and "juries". The empirical evidence suggests that death qualified juries are conviction prone, not that death qualified jurors are conviction prone. Brief of Petitioner at 20, 24. This misstates the evidence.

The uncontradicted evidence is that, on average, death qualified juries are conviction prone. Individual jurors on that jury may or may not be conviction prone. Because of the vagaries in jury selection, a particular death qualified jury might not be conviction prone in a given case. A jury might even be acquittal prone, or at least have some jurors who are acquittal prone. But, on average, death qualified juries are conviction prone. Similarly, in a Duren type jurisdiction in 1979, it was possible for a jury to contain some women. It was even remotely possible for a jury to be entirely female. But, on average, the jury was exclusively male. In Arkansas, the capital jury is always exclusively death qualified and, on average, conviction

Those who doubt empirical studies would do well to examine the innumerable voir dire transcripts replete with WEs swearing that they can be fair and impartial in determining guilt or innocence,¹⁰ and yet being systematically removed for their views about the death penalty.¹¹ Even if WEs are asked if they can be fair

prone. Death qualification results in a cross sectional violation (as in Duren), but, importantly, it also results in a conviction prone jury.

10. In Patton v. Yount, 467 U.S. ____, 81 L.Ed.2d 847 (1984), the defendant was being retried for murder. Most venirepersons knew that the defendant had previously confessed to the murder, previously claimed insanity, and previously been convicted. This publicity had touched all but one of the jurors actually impanelled. This Court held that the relevant question was "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Id.* at 81 L.Ed.2d at 857. The current system of death qualification creates an irrebuttable presumption of bias, and "the juror's protestation of impartiality" is ignored. The standard adopted below rejects the irrebuttable presumption and comports with Yount.

11. Because the death qualification process frequently occurs before the general voir dire, WEs are usually removed for cause before any general inquiry occurs concerning bias.

and impartial, their answer is irrelevant because they are removed anyway for cause under Witherspoon. For example, the Fifth Circuit found that two veniremen were properly removed for cause in such a situation:

A reading of the transcript demonstrates that both veniremen stated unambiguously that they could fairly judge Spinkellink's guilt or innocence. However, both veniremen also made it "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them."

Spinkellink, 578 F.2d at 592 (quoting Witherspoon, 391 U.S. at 522-23 n. 21).¹²

The empirical evidence below confirms live responses given by actual venirepersons in countless capital trials: WEs can be fair and impartial in determining guilt or innocence.

-
12. Lower courts have required venirepersons to lip-synch the rigid phraseology of Witherspoon dicta. While Witt abrogated the rigid phraseology, there can be little doubt that the collateral attacks will continue as the lower courts struggle to find the limitations on exclusions by the state under Witt.

In reaffirming the Adams v. Texas, 448 U.S. 38 (1980) standard for exclusion, Id. at 45, this Court carefully avoided a holding that a juror unable to impose the sentence of death was properly excluded from the guilt phase of the trial.

It is of note that the venireperson whose exclusion in Witt prompted a collateral attack through the federal system would have been removed for bias under the holding in the case at bar. The standard voir dire process would have eliminated the venireperson since her beliefs would have interfered with her ability to be fair and impartial. Witt at 83 L.Ed.2d at 846. This is the type of juror Grigsby holds properly excludable, supra note 5. And this Court would agree since it has noted: "[W]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." Witt, 83 L.Ed.2d at 851. Likewise, simply because the state has charged a capital crime, it should not be entitled to a legal presumption or standard that allows impartial jurors to be removed when the result is a jury that is quite likely biased in its favor.

Witt carefully avoided a standard by which venirepersons are excluded solely because they are unable to consider capital punishment. A simplistic argument against the holding below is that WEs are properly removed from jury service because they are unable to apply the law, i.e., unable to consider the full range of punishment. See Grigsby, 758 F.2d at 250, n.8. That argument ignores the many points raised by respondent and amici in their briefs.

III. WEs WOULD PLAY AN IMPORTANT ROLE IN
JURY DELIBERATIONS AND SHOULD BE ALLOWED
TO SERVE.

The empirical evidence is overwhelming. When WEs, who can be fair and impartial, are systematically excluded from the jury, the resulting jury is, on average, conviction prone. This Court has recognized the importance of deliberations to the jury process in the course of noting that jury size and composition affect deliberations. The evidence below supports this Court's reasoning in Ballew v. Georgia, 435 U.S. 223 (1978) and Taylor v. Louisiana, 419 U.S. 522 (1975) by showing that jury deliberations are affected by the exclusion of WEs who can be fair and impartial. The result of such exclusion, as this Court has feared, is "inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities...." Ballew, 435 U.S. at 239.

The reason this Court has not allowed distinctive

groups to be systematically excluded is because there is a possibility that the excluded group will have ideas, beliefs, experiences, or attitudes that might impact upon the jury's determination of guilt or innocence. In the instant case, the Court of Appeals reasons that WEs must be included because they have an amalgam of beliefs that the empirical evidence shows and trial attorneys know actually do affect the deliberations on guilt or innocence. If a physically distinct group cannot be excluded because it might have attitudes that could influence jury deliberations (as in Taylor), excluding a group whose distinctive quality is attitudes that actually do influence jury deliberations cannot be justified.

While the exclusion of WEs "may not in a given case make an iota of difference[.] . . . a flavor, a distinct quality is lost" if they are systematically removed. (Taylor, 419 U.S. at 531-32)(quoting Ballard v. United States, 329 U.S. 187, 193-94 (1946)(addressing the exclusion of women from the jury)). Trial attorneys and judges have spoken of the "gut-feeling" that a

death qualified jury is conviction prone. Gut-feelings and mysticism should not be the basis for constitutional law, Taylor, 419 U.S. at 541-42(dissent by Rehnquist), but the empirical evidence below verifies these feelings, grounding them in reality and fact. The empirical evidence has been "subjected to the . . . adversary system," Ballew, 435 U.S. at 246 (concurring opinion by Powell, Rehnquist, JJ., the Chief Justice), and is persuasive.¹³

WEs play a vital role in the jury process. If the judgment below is not affirmed, the jury function will continue to be corrupted by the death qualification process for purported benefits in the sentencing phase that, in reality, do not exist. Given the function and purpose of the jury, WEs should not be removed from the guilt phase of the capital trial.

13. That the evidence is persuasive cannot be denied. Every court that has conducted a full evidentiary hearing on death qualification has concluded that the resulting jury is either conviction prone, or unrepresentative, or both. See e.g. Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal.Rptr. 1238 (1980); Keeten v. Garrison, 578

IV. THE STATE'S INTEREST IN CAPITAL
PUNISHMENT IS BETTER SERVED BY CHANGES IN
THE SENTENCING PROCEDURE.

The death qualification process results in a conviction prone jury. It also does not adequately provide the state with a sentencer able to rationally and consistently apply the death penalty.

Arkansas argues that it has a right to a single jury determination of guilt/innocence and sentence.¹⁴

Petitioner, in part, bases its claim on the Sixth Amend-

F.Supp. 1164 (W.D.N.C.), rev'd, 742 F.2d 129 (4th Cir. 1984); Grigsby v. Mabry, 569 F.Supp. 1273 (1983). The litany of cases in Brief of Petitioner at 26-27 n.9b only shows the courts that have rejected the McCree argument without hearing the McCree evidence--a peculiar form of constitutional decisionmaking.

14. Avoiding the temptation to refute Arkansas' suggestion that death qualification and single jury sentencing is for the benefit of the defendant, Brief for Petitioner at 13,14,16; Brief for Amicus Crump at 5-12, we only note that no empirical evidence supports the suggestion, and no defense bar brief is likely to support the argument.

ment. Brief of Petitioner at 31, n.12. It is an odd assertion that the Sixth Amendment was designed to protect the state's prosecutor. But in any event, no party, not even a defendant, has a Sixth Amendment right to a jury determination of sentence:

In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional."

Spaziano v. Florida, 468 U.S. ___, 82 L.Ed.2d 340, 355 (1984).

While Arkansas has a legitimate interest in capital punishment, it has no right to demand either a unanimous jury determination of sentence or a single jury for both phases in a capital trial. In fact, a number of capital trial schemes would eliminate the need for death qualification and provide the state with a sentencer better able to apply the death penalty rationally. Sentencing by the judge avoids the problem, as does an advisory jury, alternate jurors for the

sentencing phase, or a nonunanimous sentencing jury. Thus, Arkansas has options available that would allow inclusion of all qualified jurors in the guilt phase and result in more consistent decisions in the sentencing phase. Despite this, Arkansas rigidly adheres to a capital scheme that detrimentally affects the substantive constitutional right of a defendant to an impartial, representative jury. The Court of Appeals only requires that Arkansas not demand the one capital procedure that results in a conviction prone jury.

SUMMARY

The death penalty voir dire process may have served a useful purpose at one time, when capital juries with unguided discretion imposed verdict and sentence at the same time. In light of present capital schemes that already employ two phases--one for guilt, another for punishment--the need for the death qualification process is outworn. For the defendant, the empirical evidence is overwhelming that death qualification removes a sizable group of qualified jurors

from jury service, and interferes with the deliberative function of the jury. For the state, a prosecution prone jury is gained at the expense of a sentencing jury that is, at best, uneven in its ability to sentence to death those defendants most deserving of capital punishment.

This case is simply one about the Sixth Amendment right to a jury trial, intensified by the punishment at stake. By affirming the judgment below, this Court will restore the jury in a capital case to its true function: interposing between the accused and his accuser the commonsense judgment of a group of laymen, free to deliberate on the factual issue of the defendant's guilt or innocence.

CONCLUSION

The judgment of the United States Court of Appeals should be AFFIRMED.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

DEC 24 1965

JOSEPH F. SPANGL, JR.
CLERK

NO. 84-1865

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

A. L. LOCKHART

Petitioner

v.

ARDIA V. MCCREE

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	111.
BRIEF OF AMICI CURIAE	1
INTEREST OF AMICI CURIAE	1
CONSENT TO FILE GRANTED	4
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT AND AUTHORITIES	11
 I. CAPITAL TRIALS ARE BIFURCATED IN RECOGNITION OF THE TWO SEPARATE ISSUES TO BE DECIDED: THE FACTUAL ISSUE OF GUILT AND THE MORAL-ETHICAL ISSUE OF PUNISHMENT.	 11
 A. The First Phase--A Factual Determination of Guilt or Innocence.	 12
 1. Death qualification im- pinges jury deliberations and results in a jury that is, on average, conviction prone.	 16
 B. The Second Phase--What Punish- ment Does This Defendant Deserve?	 18

1. Death qualification taints the sentencing function by alternatively 1) "produc[ing] a jury uncommonly willing to condemn a man to die" <u>Witherspoon v. Illinois</u> , 391 U.S. 510, 521 (1968), or 2) leaving on the jury persons who are incapable of applying the death penalty in a proper case.	20
II. WEs ARE NOT VERDICT NULLIFIERS: THEY ARE ABLE TO IMPARTIALLY DETERMINE GUILT OR INNOCENCE.	24
III. WEs WOULD PLAY AN IMPORTANT ROLE IN JURY DELIBERATIONS AND SHOULD BE ALLOWED TO SERVE.	36
IV. THE STATE'S INTEREST IN CAPITAL PUNISHMENT IS BETTER SERVED BY CHANGES IN THE SENTENCING PROCEDURE.	40
SUMMARY	43
CONCLUSION	45

TABLE OF AUTHORITIES

CASES:	PAGE
<u>Adams v. Texas,</u> 448 U.S. 38 (1980)	33
<u>Apodaca v. Oregon,</u> 406 U.S. 404 (1972)	14
<u>Ballard v. United States,</u> 329 U.S. 187 (1948)	15, 38
<u>Ballew v. Georgia</u> 435 U.S. 223 (1978)	16, 18, 36, 37, 39
<u>Beck v. Alabama,</u> 447 U.S. 625 (1980)	19
<u>Duncan v. Louisiana,</u> 391 U.S. 145 (1968)	14
<u>Duren v. Missouri,</u> 439 U.S. 357 (1979)	15, 31
<u>Eddings v. Oklahoma,</u> 455 U.S. 104 (1982)	19
<u>Gregg v. Georgia,</u> 428 U.S. 153 (1976)	19, 22
<u>Grigsby v. Mabry,</u> 569 F.Supp. 1273 (E.D.Ark. 1983)	28, 39
<u>Grigsby v. Mabry,</u> 758 F.2d 226 (8th Cir. 1985)	7, 29, 35

<u>Hovey v. Superior Court.</u> 28 Cal.3d 1, 616 P.2d 1301, 168 Cal. Rptr. 1238 (1980)	39
<u>Johnson v. Louisiana.</u> 406 U.S. 356 (1972)	14
<u>Jurek v. Texas.</u> 428 U.S. 262 (1976)	19
<u>Keeten v. Garrison.</u> 578 F.Supp. 1164 (W.D.N.C.), <u>rev'd.</u> 742 F.2d 129 (4th Cir. 1984)	39
<u>Keeten v. Garrison.</u> 742 F.2d 129 (4th Cir. 1984)	26
<u>O'Brien v. Estelle.</u> 714 F.2d 365 (5th Cir. 1983)	13
<u>Patton v. Yount.</u> 104 S.Ct. 2885 (1984)	32
<u>Pierre v. Louisiana.</u> 306 U.S. 354 (1939)	13
<u>Spaziano v. Florida.</u> 468 U.S. _____, 82 L.Ed.2d 340 (1984)	41
<u>Spinkellink v. Wainwright.</u> 578 F.2d 582 (5th Cir. 1978), <u>cert. denied.</u> 440 U.S. 976 (1979)	13, 25, 33
<u>Strauder v. West Virginia.</u> 100 U.S. 303 (1880)	13
<u>Taylor v. Louisiana.</u> 419 U.S. 522 (1975)	13, 15, 36, 38

<u>Thiel v. Southern Pacific Co.,</u> 328 U.S. 217 (1946)	12
<u>Wainwright v. Witt.</u> 105 S.Ct. 844 (1985)	passim
<u>Williams v. Florida.</u> 399 U.S. 78 (1970)	14,16
<u>Witherspoon v. Illinois.</u> 391 U.S. 510 (1968)	passim
<u>Zant v. Stephens.</u> 103 S.Ct. 2377 (1983)	20

SECONDARY AUTHORITIES

<u>Casenote. Grigsby v. Mabry.</u> 54 UMKC L.Rev. 122 (1985)	8,30
Finnical. Strategy and Tactics in the Jury Selection Process in Death Penalty Cases. A Prosecutor's Perspec- tive (1985)(Mo Attn'y Gen. Office)	17
Winick. Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitu- tional Analysis. 81 Mich. L. Rev. 1 (1982)	22

IN THE
SUPREME COURT OF THE UNITED STATES

A. L. LOCKHART
Petitioner
v.

ARDIA V. McCREE
Respondent

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are practitioners in the criminal justice system and, as prosecutor and defense counsel, appear in the trial courts of Missouri to represent the State and defendants, and may be able to assist this Court in considering the issues in the case below. While as individuals, amici disagree on the wisdom and constitutionality of capital punishment, for the purposes of this case we concede the general propriety of that penalty.

However, the present system of death qualification distorts the jury function; does not adequately protect the defendant's right to a representative cross-sectional jury; and does not adequately protect the state's interest in a sentencer able to rationally and consistently impose the penalty of death.

PURPOSE OF AMICI BRIEF

Amici's purpose in this brief is to deal with the practical effect of the decision below. The elimination of the death qualification process will improve the deliberative function of the jury in the finding of guilt or innocence; and will require the States to adopt a sentencing scheme more capable of rationally imposing punishment. Amicus has communicated with counsel for Petitioner and Respondent in an effort to avoid undue

duplication. It is believed that this brief addresses the practical implications of the case at bar in a manner that will not be done by either Petitioner or Respondent.

IMPORTANCE OF THE ISSUES ADDRESSED

The Witherspoon-Witt voir dire process [Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 105 S.Ct. 844 (1985)] consumes a disproportionate amount of time and effort in the trial and appeal of capital cases and fails to accomplish its purposes. The holding below eliminates this problem by removing this portion of the voir dire, returning it to its proper function--to elicit views, feelings, and attitudes from the venirepersons that might interfere with their ability to be fair and impartial in determining guilt or innocence.

CONSENT GRANTED TO FILE AMICUS

BRIEF

The request to file this amicus curiae brief has been granted by Arkansas Attorney General John Steven Clark for the Petitioner and by John Charles Boger, attorney for the Respondent.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case made by the Petitioner.

INTRODUCTION

While the issue addressed in the instant case relates to the Sixth Amendment right to a representative, impartial jury, its real significance is revealed against the backdrop of capital punishment. Because of this, it is not surprising to find the lines (and briefs) drawn according to interests of prosecution and defense, crime control and due

process, death penalty and abolition.

Amici represent both sides of the line: prosecutor and defense attorney. And both agree that permitting death qualified juries to operate as they do in Arkansas is detrimental to the sound administration of the homicide laws and inconsistent with the requirements of the Sixth and Fourteenth Amendments. .

For the prosecutor, death qualification gives an unneeded advantage in the first phase of the capital trial. In the second phase, death qualification fails in creating a sentencing jury consistently able to impose the death sentence on those criminals most deserving of the punishment.

For the defense attorney, death qualification creates a conviction prone jury in the first phase. In the second phase,

it results in a jury that chooses punishment arbitrarily--sometimes to the benefit of a defendant, sometimes to his detriment.

In the adversary process, it is easy to lose sight of the possibility that the status quo can change without either side losing. This is true in the instant case. Empirical evidence compels this Court, as it did the Court of Appeals, to look anew at the voir dire process in capital trials.

Prosecution and defense alike have long believed that the capital jury selection process results in a jury that is prosecution prone. Because of footnote dicta in Witherspoon v. Illinois, 391 U.S. 510 (1968), such a jury has been accepted as one that is as fair as it can be, despite the large number of venire-

persons excluded from jury service by their refusal or inability to consider the imposition of death. The Eighth Circuit decision below in Grigsby v. Mabry, 758 F.2d 226 (8th Circuit 1985) provides this Court with an opportunity to reexamine the death qualification process upon consideration of empirical evidence and in light of a bifurcated capital trial not at issue in Witherspoon.

SUMMARY OF ARGUMENT

It is expected that Petitioner's and Respondent's briefs will thoroughly discuss the case law and the empirical evidence presented in the courts below. This brief does not intend to repeat arguments of the parties. Rather, it deals with the practical effect of the death qualification process on the

interests of the state and the defendant.

Capital trials are bifurcated in recognition of the two distinct functions performed by the jury: the factual determination of guilt or innocence and the moral-ethical issue of punishment. See, Casenote, Grigsby v. Mabry, 54 UMKC L.Rev. 122, 136-42 (1985).

This dual function of the jury--fact finder and sentencer--creates the conflict before this Court: the defendant's right to a fair finding of fact as to guilt or innocence, and the state's right to a fair determination of sentence.

The overwhelming empirical evidence found below demonstrates that the current approach to this conflict--death qualification--does not serve its purpose and has corrupted the jury system. By excluding WEs (see infra note 6), current death

qualifying procedures inhibit the jury's deliberative function in the first phase; and do not properly protect the state's interests in rational and consistent sentencing in the second phase.

Death qualification focuses on the second function of the jury: the issue of punishment. Yet death qualification consistently fails to impanel for the sentencing phase a jury able to rationally and consistently impose the sentence of death. Because a venireperson's responses during death qualification do not reflect with complete accuracy that individual's views, the imposition of capital punishment is arbitrary. A venireperson's ability to consider the punishment of death in the abstract, but inability to impose that punishment in any concrete case, frustrates the state's legitimate

interest in capital punishment.

The result is a confusing, frequently challenged voir dire process that forces the defendant to trial before an unrepresentative, conviction prone jury; and forces the state to submit the penalty issue to a jury whose decision can be nullified by a single juror whose inability to truly consider a sentence of death escaped the prosecutor's notice by not appearing or surfacing during voir dire. The judgment below should be AFFIRMED to enhance the accuracy of both phases of the capital trial.

ARGUMENT

I. CAPITAL TRIALS ARE BIFURCATED IN RECOGNITION OF THE TWO SEPARATE ISSUES TO BE DECIDED: THE FACTUAL ISSUE OF GUILT AND THE MORAL-ETHICAL ISSUE OF PUNISHMENT.

The jury serves its traditional function in the guilt phase of a capital trial--the factual determination of guilt or innocence. In the penalty phase, the function of the sentencer is to decide what is fair or just. The mental process employed by jurors in each phase is different. That is why an individual juror who is adamantly opposed to capital punishment can be fair and impartial in deciding guilt.¹ The two functions are

1. The empirical evidence shows that a large percentage of individuals unable to impose capital punishment can, nonetheless, fairly determine

qualitatively different.

A. The First Phase -- A Factual Determination of Guilt or Innocence.

In the first phase of the trial, the jury is called upon to find the facts. In a litany of cases, this Court has given meaning to the jury right guaranteed by the Sixth and Fourteenth Amendments. Trial by jury is fundamental to the American scheme of justice. Among other things,² it provides an accused with an

guilt or innocence. Most individuals opposed to capital punishment base their belief on philosophical, moral, or religious grounds. The determination of guilt or innocence, on the other hand, is grounded upon a factual finding from the evidence. It is, therefore, not surprising to find a juror unable to vote for capital punishment able to determine guilt or innocence.

2. The jury serves purposes and functions for the jurors as well. Jury service is a democratic concept, "a privilege of citizenship" Thiel v. Southern Pac. Co., 328 U.S. 217, 224

inestimable safeguard against the over-zealous prosecutor or biased judge.

(1946). "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." Taylor v. Louisiana, 419 U.S. 522, 530 (1975). Indeed, there exists an independent due process right for qualified citizens to be included in the jury process. Strauder v. West Virginia, 100 U.S. 303, 310 (1880). "[T]rial by jury cease[s] to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races--otherwise qualified to serve as jurors in a community--are excluded as such from jury service." Pierre v. Louisiana 306 U.S. 354, 358 (1959) (emphasis added).

One of the most striking aspects of the current death qualification process is the number of good, qualified venirepersons barred from service because of their views on capital punishment. Although they "state unambiguously that they could fairly judge ... guilt or innocence" (Spinkellink v. Wainwright, 578 F.2d 582, 592 (5th Cir. 1978)) they are presumed to be "lying" jurors (O'Brien v. Estelle, 714 F.2d 365, 406 (5th Cir. 1983) (Buchmeyer, J., dissenting)).

Duncan v. Louisiana, 391 U.S. 145, 149, 156 (1968).³ The essential feature of a jury lies in the interposition between the accused and his accuser of the common-sense judgment of a cross-section of the community, able to deliberate on the question of the defendant's guilt. Williams v. Florida, 399 U.S. 78 (1970); Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972); Johnson v. Louisiana, 406 U.S. 356, 362 (1972).

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3. One of the concerns with the present capital scheme employed by Arkansas is that an "overzealous prosecutor" has unguided discretion to procure a prosecution prone jury merely by whimsically elevating the crime charged to a capital level.

This Court has recognized that the fact finding function of the jury requires group deliberation. In forbidding the exclusion of distinctive groups, Duren v. Missouri, 439 U.S. 357, 364 (1979), Taylor v. Louisiana, 419 U.S. 522, 530-32, Ballard v. United States, 329 U.S. 187, 193-94 (1946), the importance of group deliberation has been underscored. Even though the exclusion of a group might not make one iota of difference in any particular case, group attitudes and "the subtle interplay of influence[s] one on the other", Taylor, 419 U.S. at 531-32 (quoting Ballard, 329 U.S. at 194) are important in the deliberative process and should not be purposely removed by the procedures employed by the courts during voir dire.

If the deliberative function is pre-

served, the jury has fulfilled its constitutional purpose as fact finder, even when acting without unanimity, without twelve jurors, or without members of the defendant's particular peer group. Ballew v. Georgia, 435 U.S. 223, 239 (1978); Williams v. Florida, 399 U.S. 78 (1970).

i. Death qualification impinges upon jury deliberations and results in a jury that is, on average, conviction prone.

The empirical evidence presented in the cases below confirms what trial lawyers and judges have known for years: death qualified juries tend to favor the prosecution. Tim M. Finnical, an assistant attorney general with the Missouri Attorney General's Office, delivered a paper on death qualification at the statewide meeting of Prosecuting Attorneys December 5-7, 1985. In Strategy

and Tactics in the Jury Selection Process in Death Penalty Cases. A Prosecutor's Perspective (1985)(cited as Strategy) (available from Missouri Attorney General's Office). Mr. Finnical notes the power of death qualification:

[I]n the hands of a prepared state's attorney the death penalty jury selection process as in no other type of criminal case holds the ultimate weapon, the edge for maximum success. The voir dire in death cases gives you the prosecutor certain unique opportunities to apply effective tactics which are unavailable in other criminal cases.

Id. at 2.

It is ironic that the only time a defendant will be subjected to a jury that trial attorneys and judges know and overwhelming empirical evidence shows is, on average, conviction prone, is when his life is at issue--a time when it is most important that the jury start from a position of scrupulous neutrality in its

ability to reach a proper verdict. Even a misdemeanant is guaranteed an impartial jury drawn from a cross-section of the community. Ballew, supra (misdemeanor obscenity prosecution). Yet, the capital defendant, as in no other type of criminal case, is subjected to "the ultimate weapon, the edge for maximum success"--a jury prone to convict. (Quoting from Strategy, supra.)

B. The Second Phase--What Punishment Does This Defendant Deserve?

Sentencing in any criminal trial involves a different process than the determination of guilt. While guilt is a factual finding, punishment is a question of what is fair and just. What does this defendant deserve? Recognizing that "there is a significant constitutional difference between the death penalty and

lesser punishments," Beck v. Alabama 447 U.S. 625, 637 (1980), this Court has required that the sentencer in a capital trial, be it judge, jury, or both, "have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

The qualitative difference of the death penalty requires that it not be applied arbitrarily or discriminatorily. Gregg v. Georgia, 428 U.S. 153, 188 (1976)(opinion of Stewart, Powell, and Stevens, JJ.). To aid in "measured, consistent application and fairness to the accused," Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982), the facts and circumstances of the individual and his crime must form the basis for choosing

from among the many criminal defendants the few who are sentenced to death. Zant v. Stephens, 103 S.Ct. 2377 (1983). Additional information is required because punishment is not a finding of fact and is not determined by the same mental process as is guilt or innocence.

1. Death Qualification Taints the Sentencing Function by Alternately: 1) "produc[ing] a jury uncommonly willing to condemn a man to die" Witherspoon v. Illinois, 391 U.S. 510, 521 (1968), or 2) leaving on the jury persons who are incapable of applying the death penalty in a proper case.

The first effect of death qualification is that jurors with "conscientious scruples" against capital punishment are identified. After striking WEs for cause (even those who unambiguously state under

oath that they can be fair and impartial),⁴ prosecutors routinely use peremptory challenges to remove jurors with mere scruples against the death penalty. Countless voir dire transcripts bear witness to this practice, the empirical evidence below confirms the conviction prone effect, and Witherspoon condemns the ultimate result--a jury uncommonly willing to vote for capital punishment. The process found unconstitutional in Witherspoon is merely delayed--from the stage of challenges for cause to the

4. See infra page 33 (quote from Spinkellink).

stage of peremptory challenges.⁵

The second effect of death qualification is the frustration of the state's interest in picking a jury capable of administering the death penalty rationally. While prosecutors endeavor to eliminate jurors unable to impose the sentence of death, the process can rarely be entirely accurate. Because death qualification can not, with complete accuracy, identify jurors unable to impose the death penalty, and because Gregg capital sentencing schemes routinely require a unanimous sentence, proper sentencing de-

5. See generally Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982)(finding Florida prosecutors systematically exclude mildly scrupled jurors in capital cases by peremptory challenges after first striking WEs for cause).

cisions are frequently frustrated by a single juror.

In states requiring jury unanimity to impose the sentence of death, the results are arbitrary. A heinous crime, committed by a defendant who justly deserves the death penalty, is punished with life imprisonment because one or more jurors refuse to vote for death. Another defendant, who encounters a jury truly death qualified, is sentenced by a jury "uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. at 521. The capital voir dire process is simply not refined enough to obviate the idiosyncratic results so ever-present in capital sentencing throughout the country.

The death qualification process falls woefully short of its purported purpose: fair and consistent application of the

death penalty. It makes the sentencing phase less accurate and rational. Either the state is not provided with a jury capable of returning the death penalty in the appropriate case, or the defendant is tried by a jury effectively purged of all jurors with mere conscientious scruples against the sentence of death.

Any perceived saving of time or money in using a single jury capital scheme is not justified by any real benefit to the state. Instead, the present capital scheme saddles the community with a sentencing jury often incapable of assessing a proper punishment.

II. WEs ARE NOT VERDICT NULLIFIERS: THEY ARE ABLE TO IMPARTIALLY DETERMINE GUILT OR INNOCENCE.

A recurrent concern among prosecutors is that unless WEs are excluded, they

will act as nullifiers in the guilt phase of the trial. If the two alternatives in a capital trial are 1) a jury without WEs that is conviction prone, or 2) a jury that includes WEs who will upset or nullify the verdict because they cannot be fair and impartial, most observers would undoubtedly agree that a jury with "proneness" is better than a jury with actual bias. Though in reality unfounded, the nullifier concern has been the focus of consideration by courts of the Sixth Amendment issue raised below.

In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), the Fifth Circuit, without the benefit of empirical evidence or, indeed, any evidentiary hearing, commented that:

Florida apparently has concluded that, if for whatever noble reason--

religious conviction, philosophical posture, intellectual stance, or some other reason--a venireman clings so steadfastly to the belief that capital punishment is wrong that he would never under any circumstances agree to recommend the sentence of death, it is entirely possible--perhaps even probable--that such a person could not fairly judge a defendant's guilt or innocence when a capital felony is charged.... Florida has reasoned that a person may so cherish his conscientious scruples against the death penalty that he would favor the acquittal of a defendant charged with a capital felony....

Id. at 595-96 (emphasis in original).

In Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), the Fourth Circuit ignored the evidence presented to the district court and posited its own finding of fact: "[M]embers of the venire who are irrevocably opposed to capital punishment would engage in jury nullification if permitted to sit at the guilt stage of a capital case and, therefore, would not be impartial fact finders." Id. at 133.

These fears are unfounded. Although courts have assumed WEs will act as nullifiers, the evidence presented below unequivocally proves that WEs can be fair and impartial in determining guilt or innocence, yet they are denied the chance to serve.

The evidence--emphasized and repeated again and again--is that between 11% and 17% of the venire is made up of WEs who can be fair and impartial. This is the core finding of the courts below. Yet it is either ignored or misunderstood by Petitioner, who misdefines WEs so as to ignore the fact that a majority of those excluded under Witherspoon can be fair and impartial.⁶

6. The definition of "WEs" has been narrowed since 1968. Following Witherspoon, any venireperson unable to consider capital punishment was

This misdefinition obscures the evidence that out of every 100 venirepersons, 21 would be excluded under

excluded. In Grigsby, the district court noted that "all 'Witherspoon Excludables' (WEs) may be divided into 'Nullifiers' and 'Guilt Phase Includables.'" Grigsby v. Mabry, 569 F.Supp. 1273, 1291 (E.D.Ark. 1983).

The term "nullifier" is used to describe a juror who states that he would be unable to try the issue of the defendant's guilt/innocence upon the basis of the evidence and the law. In the death-penalty context this is the person who would say, "I cannot vote a defendant guilty regardless of the evidence if I know that, should he be convicted, someone else [the court or some other jury] might impose the death penalty...." It is, of course, agreed by all that "nullifiers" are properly excluded from both the guilt/innocence phase and the sentencing phase of a capital case.

Id. at 1290-91.

In the district court and 8th Circuit opinions, and as frequently repeated in this brief, the above distinctions are noted. WEs are defined as those Witherspoon excludables who can be fair and impartial.

Witherspoon, yet as many as 17 of these 21 would be fair and impartial.⁷ It is essential to understand this fact: death qualification removes nearly one-fifth of those venirepersons who can be fair and impartial.⁸

7. The 17% figure in the court's finding of 11-17%, Grigsby, 758 F.2d at 231, is taken from the studies compiled in 8 Law & Hum. Behav. 1 (1984) which give additional statistics on the venire and show that approximately 21% of the venire is excludable under Witherspoon.
8. The Brief of Amici reiterates the misdefinition of WEs:

Many of the 11% to 17% would be excluded under the court's own holding, because they not only would be unable to assess a sentence of death but also would be unable to find guilt without bias in a capital case. The actual number at issue must necessarily be considerably smaller and more difficult to determine"

Brief of Amici by Crump at 12 n.11.

This shows a fundamental misunderstanding of the evidence. Excluding nearly one-fifth of the fair and impartial venirepersons affects the makeup of the jury. On a twelve person jury, on average, two fair and

This attempt to identify and remove nearly one-fifth of the jury panel brings into sharper focus the effect of death qualification upon the jury, both in terms of the imbalance against the defendant and the difficulty in impanelling a sentencing jury capable of unanimity.

The district court's finding was that 11-17% of the qualified venire represented WEs who could be fair and impartial. When this large block of venirepersons is removed, the resulting jury is conviction prone.⁹

impartial WEs are replaced with two death qualified jurors. For an explanation of the effect on the jury when WEs are replaced with death qualified jurors, see, Casenote, Grigsby v. Mabry, 54 UMKC L.Rev. 122, 141-42 (1985).

9. Another source of confusion is Petitioner's improper distinction between "jurors" and "juries". The empirical evidence suggests that death quali-

Those who doubt empirical studies would do well to examine the innumerable voir dire transcripts replete with WEs swearing that they can be fair and impar-

fied juries are conviction prone, not that death qualified jurors are conviction prone. Brief of Petitioner at 20, 24. This misstates the evidence.

The uncontradicted evidence is that, on average, death qualified juries are conviction prone. Individual jurors on that jury may or may not be conviction prone. Because of the vagaries in jury selection, a particular death qualified jury might not be conviction prone in a given case. A jury might even be acquittal prone, or at least have some jurors who are acquittal prone. But, on average, death qualified juries are conviction prone. Similarly, in a Duren type jurisdiction in 1979, it was possible for a jury to contain some women. It was even remotely possible for a jury to be entirely female. But, on average, the jury was exclusively male. In Arkansas, the capital jury is always exclusively death qualified and, on average, conviction prone. Death qualification results in a cross sectional violation (as in Duren), but, importantly, it also results in a conviction prone jury.

tial in determining guilt or innocence,¹⁰
and yet being systematically removed for
their views about the death penalty.¹¹
Even if WEs are asked if they can be fair
and impartial, their answer is irrelevant

10. In Patton v. Yount, 467 U.S. ____, 81
L.Ed.2d 847 (1984), the defendant was
being retried for murder. Most
venirepersons knew that the defendant
had previously confessed to the
murder, previously claimed insanity,
and previously been convicted. This
publicity had touched all but one of
the jurors actually impanelled. This
Court held that the relevant question
was "did a juror swear that he could
set aside any opinion he might hold
and decide the case on the evidence,
and should the juror's protestation
of impartiality have been believed."
Id. at 81 L.Ed.2d at 857. The current
system of death qualification creates
an irrebutable presumption of bias,
and "the juror's protestation of
impartiality" is ignored. The
standard adopted below rejects the
irrebutable presumption and comports
with Yount.

11. Because the death qualification
process frequently occurs before the
general voir dire, WEs are usually
removed for cause before any general
inquiry occurs concerning bias.

because they are removed anyway for cause under Witherspoon. For example, the Fifth Circuit found that two veniremen were properly removed for cause in such a situation:

A reading of the transcript demonstrates that both veniremen stated unambiguously that they could fairly judge Spenkellink's guilt or innocence. However, both veniremen also made it "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them."

Spinkellink, 578 F.2d at 592 (quoting Witherspoon, 391 U.S. at 522-23 n. 21).¹²

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12. Lower courts have required venirepersons to lipynch the rigid phraseology of Witherspoon dicta. While Witt abrogated the rigid phraseology, there can be little doubt that the collateral attacks will continue as the lower courts struggle to find the limitations on exclusions by the state under Witt.

In reaffirming the Adams v. Texas, 448 U.S. 38 (1980) standard for exclusion, Id. at 45, this Court carefully avoided a holding that a

The empirical evidence below confirms live responses given by actual venirepersons in countless capital trials: WEs can be fair and impartial in determining guilt or innocence.

juror unable to impose the sentence of death was properly excluded from the guilt phase of the trial.

It is of note that the venireperson whose exclusion in Witt prompted a collateral attack through the federal system would have been removed for bias under the holding in the case at bar. The standard voir dire process would have eliminated the venireperson since her beliefs would have interfered with her ability to be fair and impartial. Witt at 83 L.Ed.2d at 846. This is the type of juror Grigsby holds properly excludable, supra note 5. And this Court would agree since it has noted: "[W]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." Witt, 83 L.Ed.2d at 851. Likewise, simply because the state has charged a capital crime, it should not be entitled to a legal presumption or

standard that allows impartial jurors to be removed when the result is a jury that is quite likely biased in its favor.

Witt carefully avoided a standard by which venirepersons are excluded solely because they are unable to consider capital punishment. A simplistic argument against the holding below is that WEs are properly removed from jury service because they are unable to apply the law, i.e., unable to consider the full range of punishment. See Grigsby, 758 F.2d at 250, n.8. That argument ignores the many points raised by respondent and amici in their briefs.

III. WEs WOULD PLAY AN IMPORTANT ROLE
IN JURY DELIBERATIONS AND SHOULD BE
ALLOWED TO SERVE.

The empirical evidence is overwhelming. When WEs, who can be fair and impartial, are systematically excluded from the jury, the resulting jury is, on average, conviction prone. This Court has recognized the importance of deliberations to the jury process in the course of noting that jury size and composition affect deliberations. The evidence below supports this Court's reasoning in Ballew v. Georgia, 435 U.S. 223 (1978) and Taylor v. Louisiana, 419 U.S. 522 (1975) by showing that jury deliberations are affected by the exclusion of WEs who can be fair and impartial. The result of such exclusion, as this Court has feared, is "inaccurate and possibly biased decision-

making, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities...." Ballew, 435 U.S. at 239.

The reason this Court has not allowed distinctive groups to be systematically excluded is because there is a possibility that the excluded group will have ideas, beliefs, experiences, or attitudes that might impact upon the jury's determination of guilt or innocence. In the instant case, the Court of Appeals reasons that WEs must be included because they have an amalgam of beliefs that the empirical evidence shows and trial attorneys know actually do affect the deliberations on guilt or innocence. If a physically distinct group cannot be excluded because it might have attitudes that could influence jury deliberations

(as in Taylor). excluding a group whose distinctive quality is attitudes that actually do influence jury deliberations cannot be justified.

While the exclusion of WEs "may not in a given case make an iota of difference[,] . . . a flavor, a distinct quality is lost" if they are systematically removed. (Taylor, 419 U.S. at 531-32) (quoting Ballard v. United States, 329 U.S. 187, 193-94 (1946)(addressing the exclusion of women from the jury)). Trial attorneys and judges have spoken of the "gut-feeling" that a death qualified jury is conviction prone. Gut-feelings and mysticism should not be the basis for constitutional law. Taylor, 419 U.S. at 541-42(dissent by Rehnquist), but the empirical evidence below verifies these feelings, grounding them in reality and

fact. The empirical evidence has been "subjected to the . . . adversary system," Ballew, 435 U.S. at 246 (concurring opinion by Powell, Rehnquist, JJ., the Chief Justice), and is persuasive.¹³

WEs play a vital role in the jury process. If the judgment below is not affirmed, the jury function will continue

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13. That the evidence is persuasive cannot be denied. Every court that has conducted a full evidentiary hearing on death qualification has concluded that the resulting jury is either conviction prone, or unrepresentative, or both. See e.g. Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal.Rptr. 1238 (1980); Keeten v. Garrison, 578 F.Supp. 1164 (W.D.N.C.), rev'd, 742 F.2d 129 (4th Cir. 1984); Grigsby v. Mabry, 569 F.Supp. 1273 (1983). The litany of cases in Brief of Petitioner at 26-27 n.9b only shows the courts that have rejected the McCree argument without hearing the McCree evidence--a peculiar form of constitutional decisionmaking.

to be corrupted by the death qualification process for purported benefits in the sentencing phase that, in reality, do not exist. Given the function and purpose of the jury, WEs should not be removed from the guilt phase of the capital trial.

IV. THE STATE'S INTEREST IN CAPITAL PUNISHMENT IS BETTER SERVED BY CHANGES IN THE SENTENCING PROCEDURE.

The death qualification process results in a conviction prone jury. It also does not adequately provide the state with a sentencer able to rationally and consistently apply the death penalty.

Arkansas argues that it has a right to a single jury determination of guilt/innocence and sentence.¹⁴ Petition-

14. Avoiding the temptation to refute Arkansas' suggestion that death qual-

er, in part, bases its claim on the Sixth Amendment. Brief of Petitioner at 31, n.12. It is an odd assertion that the Sixth Amendment was designed to protect the state's prosecutor. But in any event, no party, not even a defendant, has a Sixth Amendment right to a jury determination of sentence:

In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional."

Spaziano v. Florida, 468 U.S. ____, 82 L.Ed.2d 340, 355 (1984).

ification and single jury sentencing are for the benefit of the defendant, Brief for Petitioner at 13,14,16; Brief for Amicus Crump at 5-12, we only note that no empirical evidence supports the suggestion, and no defense bar brief is likely to support the argument.

While Arkansas has a legitimate interest in capital punishment, it has no right to demand either a unanimous jury determination of sentence or a single jury for both phases in a capital trial. In fact, a number of capital trial schemes would eliminate the need for death qualification and provide the state with a sentencer better able to apply the death penalty rationally. Sentencing by the judge avoids the problem, as does an advisory jury, alternate jurors for the sentencing phase, or a nonunanimous sentencing jury. Thus, Arkansas has options available that would allow inclusion of all qualified jurors in the guilt phase and result in more consistent decisions in the sentencing phase. Despite this, Arkansas rigidly adheres to a capital scheme that

detrimentally affects the substantive constitutional right of a defendant to an impartial, representative jury. The Court of Appeals only requires that Arkansas not demand the one capital procedure that results in a conviction prone jury.

SUMMARY

The death penalty voir dire process may have served a useful purpose at one time, when capital juries with unguided discretion imposed verdict and sentence at the same time. In light of present capital schemes that already employ two phases--one for guilt, another for punishment--the need for the death qualification process is outworn. For the defendant, the empirical evidence is overwhelming that death qualification removes a sizable group of qualified

jurors from jury service, and interferes with the deliberative function of the jury. For the state, a prosecution prone jury is gained at the expense of a sentencing jury that is, at best, uneven in its ability to sentence to death those defendants most deserving of capital punishment.

This case is simply one about the Sixth Amendment right to a jury trial, intensified by the punishment at stake. By affirming the judgment below, this Court will restore the jury in a capital case to its true function: interposing between the accused and his accuser the commonsense judgment of a group of laymen, free to deliberate on the factual issue of the defendant's guilt or innocence.

CONCLUSION

**The judgment of the United States
Court of Appeals should be AFFIRMED.**

Respectfully submitted,

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